MISSISSIPPI LAW JOURNAL

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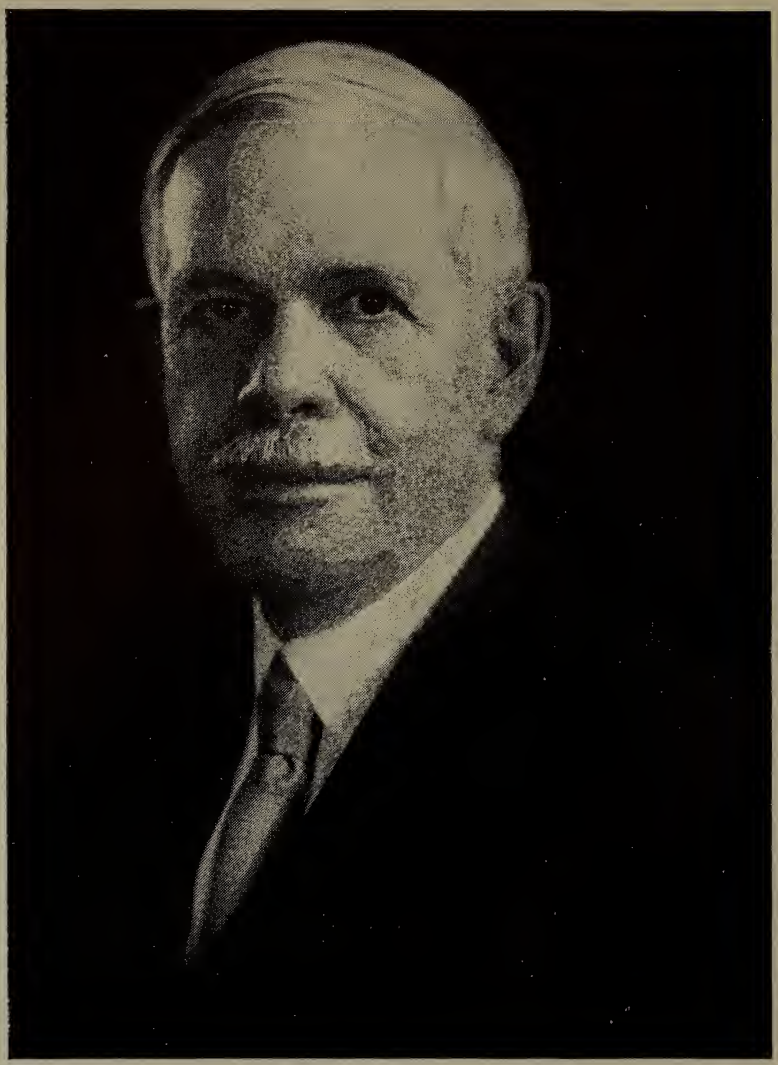

THOMAS CHARLES KIMBROUGH

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DEAN T. C. KIMBROUGH

"A small sorrow distracts, a great one makes us collected."

The death of Dean Kimbrough has made unnumbered men and women collect their thoughts, has drawn them together by ties radiating from one center, and has made them think collectively, first in deep sorrow of a great loss and then in compensating assuagement of the beauty and force of a continuously achieving and an accomplished life. I count myself more fortunate than most of this band since I have had the advantage not only of his instruction but also of his association and intimate confidence in an almost filial relationship during fair weather and foul.

Our law school as an institution certainly to this generation is but his lengthened shadow. Called to the deanship after comparatively brief service as a teacher, his was the challenge of a two-year course, traditionally given by two faculty members from text-books and lectures in an inadequate building, having two classrooms with one office and a library of five thousand volumes distributed around the walls and to the ceiling of "the downstairs," accessible only by the use of "shoe-store ladders." How he met the challenge by unwavering and unspectacular assiduity, industry, cheerful perseverance, patience, wise planning and a serenity almost unbelievable, is not fully known to anyone save his most enthusiastic votary, companion and adviser—his wife. Many of us were privileged to catch glimpses. All of us can see and know and share the results evidenced partially by a three-year course; the case-book, source and diverse methods of teaching employed by a faculty of seven members; approved listing by the American Bar Association; standardization and consequent membership in the Association of American Law Schools; the inauguration and publication of a respected law journal; a well-appointed and adequate building, housing a library of nearly twenty-five thousand volumes with a trained librarian and two assistants.

With experience and schooling so vastly different one can account for Dean Kimbrough's perspicuity in planning only by the continuous freshness of his approach to any problem,—for his adaption to and readiness for progressive change, only by that rare elasticity of mind which prevented his ever growing old. His other admirable attributes of character shone so clearly through his countenance and are so well known to all his students and other friends that to detail them seems vapid.

Suffice it to say that his life well frustrated Death—only the immediate inspiration of his presence has been removed. In paraphrase, it is for us, the living who knew him, to dedicate ourselves to the unfinished work he so nobly planned.

R. J. Farley,
Dean.

JUDGE THOMAS CHARLES KIMBROUGH

In the death of Judge Thomas Charles Kimbrough we of the University have lost one of the most able, valued, and distinguished members of the faculty. The constructive service that he rendered in administering the School of Law is immeasurable. For the quarter of a century during which he directed the professional preparation of our young lawyers, he always maintained the highest standards and adhered to such policies as to gain the greatest respect among lawyers and law educators for the School of Law at the University of Mississippi. In matters of general University policy he took a keen interest and was a valued advisor. His passing is a loss to the University, to the faculty group, and to the University community as well as to the Bar of Misssisippi and of the South.

A. B. Butts,
Chancellor.

"THE JUDGE"

Those who were privileged to study law under the tutelage of Judge T. C. Kimbrough were offered in him the perfect example of a true Christian, a gentleman, a magnetic personality, and a sincere and able student and teacher of the theory and practice of the law. He offered his understanding friendship to every student and those who accepted it delight in the memories of their association with him. His students respectfully referred to him as "The Judge."

Typed words lack the warmth and caress of admiration and love his student admirers all evidence when they speak of him and what he meant to them and the body of the law of Mississippi. His contributions to the body of the law of Mississippi are the innumerable men and women to whom, while studying law under his guidance, he offered the requisites of a sound and strong bench and bar of Mississippi and, therefore, necessarily sound legal precedents.

As a man and teacher he possessed that rare quality which places him upon a superlative plane as an instructor—that which is the *sine qua non* of an able law professor—he created in his students, who appreciated his attributes, a desire to do the students' best at all times, and to make "The Judge" proud of them. The student found himself conscious of a feeling that he must do well as a student and later as a member of the profession so as not to disappoint Judge Kimbrough.

No more glorious monument can be erected to any man than the creation in the mind and personality of his students of a desire and inspiration to succeed. Judge Kimbrough delighted in and greatly applauded the sincere efforts and successes of his students while such and as members of the bar, or businessmen generally. Their misfortunes grieved him.

I have yet to meet anyone of his students who did not love, admire and respect him personally and professionally. Those of his students who are in the active practice of law do, I am sure, continuously find themselves ever appreciative of their good fortune for having had the opportunity of their association with him, and all of them are also, because thereof, better men and women.

All discussions among his students of their college days or their activities since graduation invariably include pleasant reminiscences of "The Judge." Two of his admonitions which I have heard most often discussed are: "If you will be fair and honest with your clients and the courts you will not lack for clients." "If you will keep your office it will keep you."

If I were asked or permitted to express his most fervent wish as Dean of the Mississippi Law School, as evidenced by his untiring efforts and labor, it would be that "his boys and girls", as he affectionately referred to his students, would individually and collectively be men and women of honor, uphold justice, and make the State of Mississippi the envy of the world. As we, who were his students, approach this ideal we would delight him and honor his memory.

DUGAS SHANDS.

THOMAS C. KIMBROUGH

"Horatio, thou art e'en as just a man
As e'er my conversation coped withal."

I write this not as one who sat at his feet but as one who sat by his side. We went to the University the same year—what year it was is of concern to no one but the subject of this sketch and me. We were both charged with excessive vitality needing an outlet. We even wrestled. He was much the stronger. He had come from a sawmill, I from a farm. The sawmill is a developer of muscle; the farm is that too, but only in an average-plus sort of way. When we wrestled in the room upstairs beds were fragile pieces of furniture and we disturbed quite rudely the peace and quiet of our cultured host and hostess in the room below. We, at that time, did not know how serious it is to older people to lose their peace and quiet. What we did was innocently rude.

He helped me with my Latin; I helped him with his mathematics. We grew a close friendship that was never breached. Neither of us, even in the classes where he was at his best, evoked from teachers or classmates any flattering forecasts of what might be expected of him in the arena where men work and match their abilities and win or lose.

It was in the days of Miss Isom, who is now one of the University's cherished traditions. She staged scenes from Shakespeare with the members of her class in Elocution and played to crowded houses at Oxford and nearby towns. Tom Kimbrough, one season, played the solemn part of Jacques in "As You Like It".[1] His good voice made impressive the public soliloquy of Jacques that begins:

"All the world's a stage,
And all the men and women merely players;
They have their exits and their entrances;
And one man in his time plays many parts,
His acts being seven ages."

And when the closing line, "Sans teeth, sans eyes, sans taste, sans everything," was uttered, the actor, observing Miss Isom's technique, would let his chin descend to his chest, his shoulders droop and his arms hang limp, thus indicating total collapse.

Tom Kimbrough played well his part in Miss Isom's show, and he played well his part wherever he appeared—on the gridiron, at the bar, on the bench, on the Law Faculty of the University.

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[1]The late Will Collier was Orlando.

He was fortunate not to live to pass through Jacques' "last scene of all that ends this strange eventful history." He died, as brave men prefer, while still engaged in the battle of achievement; did never have to pass through the twilight of slow dissolution when the senses dim one by one and the attachment to life becomes a tremulous string.

His fellow students put him in the class of the "safe and sane" and they were more accurate in their estimate than they knew. He became a type of the orthodox. He believed in the potency of the two far-famed protagonists of Good and Evil; believed that there is a tangible cleavage between right and wrong; between justice and injustice; between kindness and cruelty. He believed that questions of law once settled should remain settled; that law is securely based; that when the base has been tested over and over it should be taken as final and not be subject to renewed attacks; that legal principles should at last become so settled as to be accepted at their face value. He would have joined in the lament of Mr. Justice Roberts: "I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject;"[2] and in the same Justice's expression of concern, in the same opinion, "It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions."[3]

Justice Roberts' observation is trite but still it is true that we are "in an era marked by doubt and confusion." So much is being given out in print that the citizen can hardly keep his moorings. And then the air is literally full of words; full of advice, opinions, recommendations, propaganda. Much of it has behind it no gold to warrant its issue—is no more than so many words, so many intruding suggestions. This is a time indeed when steadiness of outlook and integrity of utterance are at a premium.

However, we do not have to attribute the value of the qualities Dean Kimbrough exemplified to the fortuitous circumstance that he lived the latter years of his life amid disturbed social and economic conditions, because qualities such as he possessed are at all times accorded the highest rank.

"The world is upheld by the veracity of good men."

J. N. Flowers.

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[2]Smith v. Allwright, 321 U.S. 649, 669, 64 Sup. Ct. 757, 768, 88 L. ed. 987, 1000 (1944).

[3]*Id.* at 670, 64 Sup. Ct. at 768, 88 L. ed. at 1001.

THOMAS CHARLES KIMBROUGH

I first knew Thomas Charles Kimbrough in July, 1910, at West Point, Mississippi, in which city I had located for the practice of law. He was then a member of the firm of Critz & Kimbrough, one of the leading law firms of Mississippi.

In 1914 he was appointed Circuit Judge by the Governor of the state. He served two years, and reentered the practice at West Point. In 1920 he become Professor of Law at the University of Mississippi, and two years later was made Dean of that Law School, and so remained until his death. I had the good fortune to be a Professor of Law for seven years under him as Dean.

Judge Kimbrough had a rich heritage in his ancestral background. His forebears had been prominent in state and local affairs for many years. The splendid traits of character of his ancestors had been transmitted to him.

He was one of the most lovable men it has been my good fortune to know in this life. He was as gentle as a child, but if occasion required he was as stern as his Scotch ancestry demanded. He may have had enemies, as all strong men have; but if he had an enemy, it was not his fault.

We practiced law at the same bar for eight years. He was a hard fighter, but a fair and generous foe. He had the happy faculty of retaining the respect, friendship and confidence of his fellow lawyers.

He made a very splendid Circuit Judge. He was fair and courteous, and possessed an innate sense of justice. His temperament and disposition ideally fitted him to discharge the duties of a trial judge.

However, when he became law teacher and Dean of the Law School, the man and his work met. The discharge of those duties was not only his work—it was his life. It consumed him. He planned, and was the principal cause of the construction of, the beautiful law building now located on the campus of the University of Mississippi. As long as it stands it will be a monument to his memory. He instilled into his students not only knowledge of the law but high ideals and principles of manhood, life and service. His students, in turn, are using these ideals and principles for the betterment of their state and their respective communities. Thus Judge Kimbrough is completing a monument to his own memory, "more lasting than brass, and more sublime than the regal elevation of pyramids, which neither the wasting shower, the unavailing north-wind, or an innumerable succession of years, and the flight of seasons, shall be able to demolish."

And as he was in the midst of reaping the harvest of his great work, his devoted wife discovered one morning that he had not awakened from his night's sleep. Thus came to an end a beautiful, useful life, in a beautiful, peaceful manner.

W. G. Roberds.

THE INTERSTATE COMPACT TO CONSERVE OIL AND GAS: AN EXPERIMENT IN CO-OPERATIVE STATE PRODUCTION CONTROL

*Blakely M. Murphy**

Concomitant with a study of the Interstate Oil Compact Commission and the Interstate Compact to Conserve Oil and Gas, preliminary examination should be made of the interstate compact device to discover probable uses of such agreements. Discussion of the compact clause as contained in the Constitution of the United States, its evolution from colonial times to the present in a legal and historical sense, together with a resumé of the law of consent to interstate compacts, constitutes a digression from the major topic, but its inclusion is justifiable. From it may be learned the limiting factors of the compact clause, or, what is more important, the extent to which the clause can be used to control those areas of our political and economic life in which honest differences of opinion exist as to the supremacy of the state or federal governments.

Intercolonial agreements concerning adjustments of boundary lines were in existence in 1656, when such a pact was concluded between Connecticut and New Netherlands.[1] Such agreements were common from that date until the Revolution, nine agreements being executed from 1656 to 1773.[2]

The Articles of Confederation as shown in the Journals of the Continental Congress, submitted to that body on July 12, 1776, included in Article V[3] of that document, a clause stating:

> "No two or more Colonies shall enter into any Treaty, Confederation or Alliance whatever between them, without the previous and free consent and allowance of the United States assembled, specifying accurately the Purpose for which the same is to be entered into, and how long it shall continue."

which was further amended in the second printed draft of the Articles of Confederation, introduced into the Continental Congress on August 20, 1776, in Article V,[4] as follows:

> "No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the Consent of the United States in Congress Assembled, specifying

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*LL.B., 1939, University of Arkansas; LL.M., 1944, University of Chicago; assistant professor of law, University of Idaho; member of Oklahoma Bar Association and Oklahoma Tax Commission Bar.

[1]Frankfurter and Landis, *The Compact Clause of the Constitution* (1925) 34 YALE L. J. 685, 730.

[2]*Id.* at 731.

[3]5 JOUR. CONT. CONG. 549.

[4]*Id.* at 676.

> accurately the purposes for which the same is to be entered into and how long it shall continue."

At the time of the adoption of the Articles of Confederation in their final draft in 1777, the terms of Article V as contained in the draft of August, 1776, appeared in those same words in Article VI.

Under the authority of the Articles of Confederation four compacts were entered into between 1780 and 1788, determining boundaries between states, settling jurisdiction to certain islands in the Delaware River and regulating navigation and fishing in certain rivers, together with the jurisdiction of the states over navigable waters.[5]

The Committee of Detail, reporting its activities to the Convention, submitted a draft of a proposed Constitution, Section XIII[6] of which restates in an altered form, the provision of the Articles of Confederation, thus:

> "No State, without the consent of the Legislature of the United States, shall emit bills of credit; nor enter into any agreements or compacts with another State, or with any foreign power. . . ."

In this draft will be noted the use of the word compact. Nothing further appears to have been said or done in the Convention regarding this clause. Finally the provision found today, in the Constitution of the United States, in Article one, Paragraph ten, Subsection three, appears:

> "No State shall, without the consent of Congress. . . enter into any Agreement or Compact with another State, or with a foreign power. . . . "

The Compact clause of the Constitution being adopted, one may now wonder what the framers of the clause meant—what occasions the clause was to cover. Here the conflict begins.

It has been suggested that " '. . . agreements or compacts' as intended by the framers of the Constitution included (1) settlements of boundary lines with attending cession or exchange of strips of land, (2) regulation of matters connected with boundaries as for instance regulation of jurisdiction of offenses committed on boundary waters, or fisheries or of navigation."[7] A persuasive argument is made for this construction, and it is a construction that might well have been adopted. Examination of the compacts to which Congress has given its consent since 1789, however, discloses that such a limited contruction has never been accepted; in fact, a much wider scope has been given to the meaning of the clause.

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[5]Frankfurter and Landis, *supra* note 1, at 732.

[6]Farrand, THE RECORDS OF THE FEDERAL CONVENTION (1911) 187.

[7]Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?* (1936) 3 U. OF CHI. L. REV. 453.

Leading articles written on the compact clause, and the cases relating thereto, interpret the clause as a restriction on the authority of the states to make agreements with one another by reason of their inherent sovereignty. The restrictions expressly forbid the making of treaties, alliances or confederations, and require the consent of Congress to a compact; such consent is necessary since that body is the appropriate group to determine whether or not the pact constitutes a forbidden "treaty, confederation or alliance" or the permissible "agreement or compact."

The Constitution and the federal statutes fail to set out procedure or form for the creation and formation of the agreements or compacts permitted. There are, however, fairly well recognized modes of negotiation existing: one that might be termed the "contract" method, wherein agreement is reached by commissioners appointed by states in interest. This agreement is then ratified by the legislative bodies of the states concerned and thereafter submitted to Congress for its assent. Another method, termed by some the "reciprocal legislation method," calls for the enactment of legislation constituting an offer to enter into a compact with other states, followed by subsequent legislation in the other compacting state or states, accepting the offer. This is then followed by formal ratification of the agreement by the compacting states and the consent of Congress.

AREAS IN WHICH COMPACTS ARE ORGANIZED

There exist, in our system of state and Federal Governments, areas in which the Federal Government either lacks (or is commonly thought of as lacking) authority to act effectively to control harmful social, economic or political activities; and in which areas the state government is an ineffectual governing body because the portions of the social, economic or political activities desirable to control, take place without the political jurisdiction of the state. These activities, in whole or in part, are in that twilight zone of jurisdiction resulting from the adoption of a Constitution intended by framers to create a strong central government, but interpreted by the courts to favor "states' rights."

Regardless of what one's predilections be toward strong central governments versus governments of limited powers, in which states' rights or localism is to be preserved, or the correctness of the interpretations regarding what the founding fathers meant—or thought they meant—in writing a Constitution for the United States, it will be admitted by partisans of all shades of opinion that there is a fringe into which neither the Federal Government nor the states alone can venture effectively. In this area there are problems that must be solved.

There are solutions available in problems concerning more than one state, in (1) The National Conference of Commissioners on Uniform State Laws,[8] through the adoption of laws such as the Uniform Negotiable Instruments Act; (2) adoption of reciprocal legislation or departmental rules, wherein the citizens of a sister state, or a sister state, receive from the enacting state, the same treatment meted out to the citizens of the enacting state or the enacting state itself, such as the reciprocal car licensing laws; (3) a conscious practice of courts and administrative agencies to base decisions in certain fields of legal and administrative control on the ground of harmony among jurisdictions existing legally independent of one another; (4) conferences of governors and other state officials carried on by such organizations as the Council on State Governments and Commissions on Interstate Cooperation; (5) use of auxiliary federal legislation to aid the states to control more effectively matters which are the concern of the state, such as the assistance received from the Connally Act; (6) regulation of interstate preserves by joint actions on the part of distinct state administrative bodies to control separate portions of common interests; and (7) the interstate compact.

From 1789 to 1944 there have been some eight-two compacts entered into by various states with the consent of Congress. Subjects of compacts or agreements range from the determination of boundary lines, the objective achieved under the first compact after the adoption of the Constitution, to division of water, production control of oil and gas, or the erection of interstate bridges.

THE LAW RELATING TO CONSENT AS TO THE FORMATION OF INTERSTATE COMPACTS

The Constitution requires that "No state shall, without the consent of Congress. . . enter into any agreement or compact. . . . "[9] From this it might be supposed that the power of a state to enter into a compact would be limited solely to receiving consent of Congress. However, the power of a state is limited, not only by the necessity of obtaining Congressional consent, but also by appropriate federal statutes or treaties removing the compact's subject from state control. A state will also find its compacting power circumscribed by its own organic law.

The contention has been advanced that consent of Congress is a vital necessity in every compact. This would seem to be the general and accepted

[8]The forty-sixth annual conference of the National Conference of Commissioners on Uniform State Laws, held in 1936, adopted an amendment to its constitution, whereby the objectives of the conference have been enlarged to include "interstate compacts."

[9]Art. I, § 10, ¶ 3.

rule of law, were it not for the contrary rule laid down in decisions emanating from state courts and sustained by dicta appearing in a few federal decisions.[10] These cases hold consent to be unnecessary unless the agreement between the compacting states is one "political in nature" involving the promissory elements of a contract.[11]

Consent can be obtained from Congress by passage of an act by that body, or by resolution, and like any other bill or resolution introduced therein, such legislation must pass both houses in Congress, thereafter being presented to the President of the United States for his approval or veto. It may be of interest in passing to notice that no legislation consenting to the formation of a compact has ever been vetoed.[12] Many have encountered varying degrees of difficulty in passage, some insurmountable.

Congressional consent in any form will be sufficient. Assent may come prior to entering into and ratification of the compacting agreement or subsequent to action on the part of the states.[13] Any compacting party may withdraw from the agreement prior to assent. The Congressional permission may be specific or blanket and found in formal acts of that body, or inferred from subsequent affirmative action by Congress recognizing the existence of the agreement. The Constitution of the United States fails to state when assent shall be given, whether it shall be express, implied, whether to precede or follow the compacting agreement. In the use of the compact device, as related to interstate water compacts, experience has taught the framers of such pacts to obtain requisite permission prior to negotiation.

Congress in passing blanket consent acts, relating to possible areas in which there is an interest for the formation of compacts, has attempted to limit the required formalities. The modern practice of giving wholesale assent to any and all compacts, consummated in the future within the limits of the act, is increasing in favor and practice.

Consent of the executive to an interstate agreement was given during the existence of the National Industrial Recovery Act, when President Roosevelt[14] agreed to the promulgation and adoption of state codes regulating the sale and disposition of prison-made goods. The status of such consent was never judicially determined due to the invalidation of the Act.

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[10]Dutton, *Compacts and Trade Barriers* (1940) 16 IND. L. J. 204, 209.
[11]*Id.* at 204.
[12]Dodd, *Interstate Compacts* (1936) 70 U. S. L. REV. 557, 573.
[13]Anon., *Legal Problems Relating to Interstate Compacts* (1938) 23 IOWA L. REV. 618.
[14]Dodd, *supra* note 12, at 559.

However, there was no doubt as to the unconstitutionality of the President's action due to the phrase, ". . . without the consent of Congress."

Where requisite Congressional assent has once been obtained by the compacting states, withdrawal of such consent would not appear to be sufficient to invalidate the agreement in the absence of fraud, or a change of circumstance giving rise to previously non-existent political implications making a treaty out of what was originally intended as a compact. Congress is nowhere given authority to abrogate existing valid agreements not in conflict with its powers. Such rulings have led to the insertion of provisos, calling for limitations as to tenure in compacts, wherein renewal of assent of Congress is required at stated intervals.[15]

THE OIL STATES ADVISORY COMMITTEE—A PREDECESSOR

While the industry was completely disorganized and demoralized, the great flush production fields of Oklahoma and East Texas were brought into being. In face of this increasing flood of oil, Governor William H. Murray, of Oklahoma, called a conference at Fort Worth, Texas, of the Governors of Oklahoma and Texas, together with representatives of the Governors of New Mexico and Kansas. The meeting took place on February 26 and March 1, 1931, and resulted in an agreement to form the committee thereafter known as the Oil States Advisory Committee or the Governors' Committee.[16]

A second meeting of the group, with addition of representatives from Colorado and Ohio in attendance, convened on April 9 and 10, 1931, in consultation with the Secretaries of the Interior, War and Commerce and the Federal Oil Conservation Board. The then President, Herbert Hoover, met and discussed with them problems which the Committee had been created to solve. At the conclusion of the meeting a recommendation was made that the Federal Oil Conservation Board continue its Voluntary Committee on Economics engaged in periodical forecasts of national and regional demand and supply, that the legislatures of each state be urged

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[15]Anon., *Interstate Compacts as a Means of Settling Disputes Between States* (1922) 35 HARV. L. REV. 322; Anon., *A Reconsideration of the Nature of Interstate Compacts* (1935) 35 COL. L. REV. 76; Ireland, *Recent Developments in the Use of Interstate Water Compacts* (1944) 21 DICTA 84; Routt, *Interstate Compacts and Administrative Cooperation* (1940) 207 ANNALS 93; Spengler, *The Economic Limitations to Certain Uses of Interstate Compacts* (1937) 31 AM. POL. SCI. REV. 41; Wigmore, *Uniformity of Law—Compact Between States* (1925) 19 ILL. L. REV. 479.

[16]Information regarding activities of the Oil States Advisory Committee was drawn in part from an unpublished paper prepared by Warwick M. Downing, *The Oil States Advisory Committee, A Resumé of Its Activities and Its Contribution to the Public Welfare and to the Oil Industry,* hereinafter cited as *Advisory Committee.* Oklahoma, California, Kansas, Wyoming, Louisiana, Arkansas and Texas attended meetings.

to negotiate an interstate agreement for the formation of a compact, and that, pending such formation, an advisory liason and fact-finding committee function.

The legal sub-committee of the Committee met from April 27 to 30, 1931, with representatives of the American Bar Association, industry attorneys and the Department of the Interior to draw up a tentative draft for a compact between the states. In a meeting of the full Committee in May, 1931, a tentative draft for a Uniform Legislative Act for Conservation and Interstate Compact was approved. This draft defined waste as:

> ". . . (waste) incident to or resulting from the production of crude oil or petroleum in excess of marketing facilities or reasonable market demand."[17]

It was therein stated as a policy, in the public interest, that oil should be retained in underground storage except where needed for commerce. This demand should be first supplied from wells of settled production to prevent their injury.

Representatives of the conservation bodies of Oklahoma, Kansas and Texas met in September, 1931, at Oklahoma City with the Committee. Shortly before the Governors of Oklahoma and Texas declared martial law in their respective states, an effort to control overproduction, and shut in all wells (with some exceptions) for a stated period.[18]

At the November, 1931, Chicago meeting the legal sub-committee was directed to prepare a bill consenting to formation of an interstate compact for introduction into Congress. Acting on these instructions work was begun in the early months of 1932 to prepare legislation. Meetings were again held with representatives of the Federal Oil Conservation Board, the American Bar Association, Secretary Wilbur, Congressional personnel and attorneys engaged in the oil field. As a result of these many conferences a bill was prepared and submitted to a meeting of the full Com-

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[17] *Advisory Committee*, p. 19.

[18] Governor Murray had issued his first military order August 4, 1931, creating a military zone around wells and tanks in Oklahoma City. In a later order he continued this zone to ". . . watching the enforcement of orders of proration . . . for the purpose of actually prorating the oil output." A Proration Board was selected. This order was supplemented by one stating that the Proratior Board was not to supersede the Corporation Commission of Oklahoma. Constantin et al. v. Smith et al., 57 F. (2d) 227 (E. D. Texas 1932), *aff'd.* 287 U. S. 378, 53 Sup. Ct. 190, 77 L. ed. 375 (1932); Russel Petroleum Co. v. Walker et al., 162 Okla. 216, 19 P. (2d) 582 (1933); Bruce, *Oil Situation and the Military* (1931) 17 A. B. A. J. 643; Fairman, *Martial Law in Light of Constantin Case* (1933) 19 CORN. L. Q. 20; Logan, G., *Use of Martial Law to Regulate the Economic Welfare of the State and Its Citizens* (1931) 17 IOWA L. REV. 40; Logan, J., *Court Rules Against Martial Rule Proration in East Texas*, OIL WEEKLY, Feb. 26, 1932, p. 9; Smead, *Martial Law in Oil Fields of Oklahoma and Texas* (1935) 6 OKLA. ST. B. J. 5; *Sterling Retains Control Over East Texas Pending Supreme Court Ruling*, NATIONAL PETROLEUM NEWS, March 2, 1932, p. 11.

mittee in March, 1932, and adopted. The Committee thereafter waged an intensive battle for passage of its Compact Bill.

The proposed legislation provided for the consent in advance of Congress to the agreement or compact that might be entered into by two or more of the oil states for the conservation of oil and gas, including these objectives:

> Requirement of the most effective and economic use of reservoir energy; equitable apportionment of common sources of oil and gas; regulation of drilling and production methods to promote maximum ultimate recovery; retention underground of oil and gas in excess of transportation or market demand; prohibition of waste of all kinds, physical or economic; ratable taking of oil and gas from competing fields and wells and the authorization of unit operations in single fields or areas.[19]

Provision was made for the creation of a Federal Interstate Oil Conservation Board, one of whose members would be appointed by the President of the United States. The remainder would be selected, one each, from the several member states. Power was allocated the Board to recommend quotas of production, to approve conservation agreements and to limit imports to certain percentages. No conservation laws passed by member states, recommendations of the Board or compacts should be deemed interference with interstate commerce where approved by the federal representative.

The Committee reassembled in October of 1932 to discuss the Interstate Compact and their bill pending before Congress. Plans were laid for the next meeting in Fort Worth to put the bill into final form. However, the November meeting brought about dissolution of the Committee when the American Petroleum Institute withdrew its financial support on the ground the government was then proposing a better solution than the compact plan.[20]

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[19] *Advisory Committee,* pp. 40-41. This bill was heard before a Sub-Committee of the Senate Judiciary Committee, May, 1932, and favorably reported. It met with the same treatment in the full Committee. As the Independent Petroleum Association of America was then engaged in pushing its tariff bill before Congress (which might have been endangered by efforts to pass the Compact bill) it was decided to halt activity until after the tariff bill had its day. Unfortunately that never arrived.

[20] The proposed plan was the National Industrial Recovery Act, 48 STAT. 195 (1933), 15 U. S. C. § 701 (1934). Executive Order 6204 designated the Secretary of Interior as the Administrator. When President Roosevelt was first approached on the control of oil it was reported that he favored the compact idea. Colonel Ernest O. Thompson, Commissioner of the Railroad Commission of Texas, was asked to call a meeting of state representatives with the President. In a letter to the writer dated Oct. 4, 1944, from Colonel Thompson, it is emphatically stated that the President expressed hope that the compact would be formed; if it were he would endorse it and send it to Congress for approval. Shortly thereafter the proponents of federal

The proposed Uniform Act was sent out informally through the industry in the last months of 1932. It contained a provision as to price in a clause which operated to give the state regulatory bodies power to curtail production when reasonable market demand had to be satisfied at a price less than the average cost of production. A majority of the Committee members felt this clause not only unnecessary but illegal.

Formation of the Interstate Compact—First Ponca City Meeting

Ernest W. Marland, after his election in November, 1934, as Governor of Oklahoma, flew to Austin, Texas, to meet with Governor-elect James V. Allred, relative to a conference of oil state governors. A similar trip was made to confer with Governor Alf M. Landon of Kansas. From Dallas, Marland sent letters to the Governors and Governors-elect of New Mexico, California, Louisiana, Michigan and Wyoming, asking them to join the meeting with the Chief Executives of Oklahoma, Kansas and Texas.[21]

Press and industry journals broadcast rumors, which rapidly gained currency among the participants, of a plan by Marland to present a cut and dried program and dictate their assent to this prepared agreement.[22] The Federal Government, Marland stated, would cheerfully surrender oil regulation to the states. To still these rumors which endangered the conference Marland wrote Allred a letter in which he set out what he hoped the meeting could accomplish.[23]

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control were in full charge. The Code was adopted. Price stabilization was encouraged. The integrated portion of the industry liked the results obtainable, rightly fearing that opposition to continuance of their plans would develop should control be returned to state regulatory agencies. United States v. Standard Oil Co. of Ind. et al., 23 F. Supp. 937 (W. D. Wis. 1937), *rev'd.* 105 F. (2d) 809 (C. C. A. 7th, 1939), *rev'd.*, 310 U. S. 150, 60 Sup. Ct. 811, 84 L. ed. 1129 (1939); Nye, *National Industrial Recovery Act—Its Administration and Effect on the Petroleum Industry* (1933) 58 A. B. A. Rep. 633; Sub-Committee on Interstate and Foreign Commerce, *Petroleum Investigation Report,* 73d Congress (recess—1934), 73d and 74th Congress (1937); (1944) 3 Interstate Oil Compact Quart. Bull. 35-37.

[21]This letter as well as other valuable material comes from the files of the Honorable James V. Allred, Houston, Texas, who has graciously furnished them to the writer. The letter read: ". . . the subject of this discussion will be our attitude as Governors of the oil-producing states toward federal oil legislation in general and particularly to discuss possibilities of an interstate compact to be entered into by the oil-producing states. . . ."

[22]Dallas Morning News, Dec. 2, 1934, p. 10, said that the plan covered agreement to restrict production to market demand; legislative approval of agreement at once; ratification by the Federal Government; participation by Federal Government to see that states did not hold production down to a point where prices would be too high; and creation of a fact-finding agency to ascertain national and state demand.

[23]"First: that the oil-producing states . . . appoint an overall committee . . . from the state . . . and federal government. . . . Second: . . . they agree the function of the committee is to make . . . (a) a study of demand and supply factors, (b) that this committee recommend the total allowable for the United States and the proper allocation of this allowable as between the states, (c) that the committee be authorized to make recommendation to the oil-producing states for the modification of the conservation statutes to approach unification. . . ."

The meeting early developed two contending positions. Governor Alf M. Landon, a prominent Kansas oil producer, urged development of agreements between states to establish proper oil price structures openly or as market demand laws. Opposition to this plan crystallized around Allred, who was against price fixing in any guise. A stalemate was reached in the conference. No compromise was possible because of political commitments and personal factors.[24] Nothing remained but to adjourn the conference until the New Year.

The Second Ponca City Conference

The second meeting convened in Ponca City again in Marland's home, on January 3, 1935.[25]

Marland's December resolutions (which were in the hands of the Chief Executives of the oil states during adjournment) were presented. These called for the conference to recommend establishment by the Federal Government of a joint fact finding committee.[26] Under compacts the states would participate in this body, receive and consider its allocations of production, and cooperate in the adoption of uniform conservation laws and regulations. A proposed draft of the resolution, together with a draft of the proposed law, was read to the conference. When it was moved to consider these drafts, objection was made that the authority of many of the representatives did not empower them to discuss such plans.[27]

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[24]Marland later stated that though there were but three states present at the first meeting in his home, ". . . we had to occupy three different floors of the house in order to get along. . . ." and that his part of the conference consisted of using his feet more often than his head as he had to go up and down the floors to relay the proposals and counterproposals of the two governors.

[25]Material presented herein is drawn largely from the *Minutes of the Second Conference of the Governors of the Oil-Producing States, Held at the Home of Governor-Elect E. W. Marland (Oklahoma) on January 3, 1935.* Cited hereafter as *Minutes.* The only existing copy the writer could locate was furnished by Mr. Allred. Marland was the only governor present. The Mid-Continent Oil and Gas Association and the Independent Petroleum Association of America were present.

[26]This agency was given equal representation between national and state governments and would periodically estimate demand. It would determine the proportion of demand to be met by domestic production, importations and withdrawal from storage, and allocate the domestic production allowable between states. The President was empowered to restrict importation, prevent movement of hot oil in interstate and foreign commerce and authorize agreements between oil-producing states.

[27]Arkansas, New Mexico, and Louisiana (represented by two Texans) were clothed with full authority. Illinois and California could only make recommendations to their respective governors. Texas could only act to the extent the governor-elect possessed authority to act prior to assuming office. Kansas had authorized its people only to confer and discuss general principles not obligating their state. Marland represented Oklahoma fully.

Kansas then proposed three amendments[28] to the original proposal. Opposition broke out immediately on the Texas side to their inclusion as permitting the Federal Government to fix not only national but state quotas of production. When a vote was had, the proposals were defeated and withdrawn from consideration. With a discussion of these amendments completed, Marland suggested the propriety of returning to a consideration of the original resolution. Texas again objected to a call for a vote. Feeling in that state, her representative declared, was to enter into an interstate compact: "Well, let's make it an interstate compact and not a compact with the Federal Government."[29]

Marland offered to strike from the resolution the words "Federal Government." This, the Texas people felt, did not sufficiently remove their ground of objection. The Kansas delegation, opposed to Texas, stated that without the " . . . leverage of the Federal Government, we won't accomplish anything under this compact."[30] Marland attempted to please both by explaining he was certain Congress would not approve an interstate compact without some degree of federal representation. The change was approved.

At the afternoon session Blalock of Texas set forth the views of his principal, Governor-elect Allred.[31] He attacked the resolution as going beyond the authority of the conferees and a commitment of their states to an agreement repugnant to their peoples. Why not, he urged, secure first Congressional consent to enter a compact and leave the exact terms to the legislative bodies of each state? His statement of the Allred position

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[28]The first was worded: "In case such fact-finding body shall fail to agree, it shall certify such disagreement to the President, who shall then . . . make allocations. . . ." The second provided ". . . the . . . allocation . . . shall not be exceeded by any State at any time. . . ." The third suggested that imports be limited to four and one-half per cent of the domestic allowable production as determined by the fact-finding agency.

[29]*Minutes*, p. 15.

[30]*Id.* at 17, 18.

[31]Governor Allred was opposed to federal control or regulation of the production of crude oil within the boundaries of Texas. He favored enactment by Congress into permanent legislation the provision against interstate transportation of hot oil. He favored limitation by Congress of the importation of crude petroleum into the United States. He favored the prevention of physical waste of oil in his state and felt Texas had ample laws to prevent waste. He intended to enforce these laws properly. Should Congress deem it advisable for the States to cooperate in the conservation of petroleum, and if permission were granted, the grant should be on the following conditions: "a. Said grant should be permissive only. b. Said permissive grant should confine the States to the consideration of conservation, that is to say, the prevention of physical waste of natural resources. c. Said permissive grant should recognize that the right to control the production of crude petroleum is a matter exclusively within the jurisdiction of the several producing states. d. Said permissive grant should specifically prohibit the states from entering into any compact which has as its purpose price-fixing, the creation of or perpetration of monopoly or regimentation."

foreshadowed the position this state and its bloc of adherents would take on the adoption of the Marland resolution. The proposal passed.[32]

With approval secured for his resolutions, Marland next proposed consideration of legislation in the several states to create a compact. He moved the recommendation of a statute substantially in the form of his uniform law.[33] Marland requested that as each state passed the necessary enabling legislation he be notified. When three or more states had favorably acted, he would then reconvene the conference. After lengthy arguments against his motion as subjecting the states to federal control Texas proposed the suggestion be tabled. When put to a vote they lost, and the resolution was adopted.[34]

Mr. Farrel, representing Louisiana, moved adoption of a resolution reading:

> "RESOLVED, that the Congress be requested to pass legislation permitting the oil-producing states to enter into an interstate compact for the conservation of petroleum and the prevention of waste of this natural resource.
>
> "BE IT FURTHER RESOLVED, that the legislatures of the various oil-producing states be submitted a bill authorizing representatives of the states to meet and adopt a compact for the purpose of the conservation of the petroleum resources of the States and the prevention of waste of these petroleum resources."[35]

It was unanimously adopted, with some qualifications as to voting. This led to the introduction of the Allred-sponsored resolution:

> "RESOLVED, that if Congress sees fit to pass legislation authorizing an interstate compact, said permissive grant should specifically prohibit the states from entering into any compact which has as its purpose price-fixing or perpetuation of monopoly."[36]

After extended arguments between Blalock and Marland as to the part price fixing should play in conservation,[37] the motion was tabled. Defeat lead Blalock to insert Allred's views once again to restate the Texas position.

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[32]Texas, Arkansas and Louisiana against; California, Oklahoma, Illinois, Kansas and New Mexico for.

[33]The uniform law authorized the governor of each state to appoint a representative to meet with representatives of other states to agree on a compact.

[34]Texas' motion lost four to three. Marland's resolution on motion won five to three.

[35]A vote for the motion did not rescind, revoke or prejudice any previously adopted resolution, or affirm anything that had been previously done.

[36]*Minutes*, pp. 30, 31.

[37]*Id.* at 31, 32.

Two meetings had centered the field of controversy around the Marland and Allred programs. Aligned squarely with the Marland efforts were the delegates from Illinois, Kansas, New Mexico and California. Their field of activity crystallized in the idea of federal and state co-operative control. Blalock, with his friends, and the conferees from Arkansas and Louisiana, were the opposition. Lines of disagreement were clear. The coming conferences could foresee the items of dissension—cooperation with the national government and price fixing as an element in conservation.

The Third Meeting—Dallas, Texas

On February 15, 1935, the requisite number of states having enacted the authorizing legislation,[38] Governor Marland convoked the third meeting. Representatives from nine states were in attendance.[39]

Marland offered the conference Governor Allred as its permanent chairman. The latter urged selection of Marland on the basis of past experience in presiding at the previous meetings. This exchange of proposal and counterproposal accurately charted the course of the conference. A tense situation created by the manner in which the press had played up the Allred-Marland controversy intensified the determination of each to secure enactment of his program. Both sought the spotlight.

In Marland's address to the conference he outlined his activities leading to a call of the conferences, and the resolution unanimously adopted at the second meeting which called on the legislatures of the oil-producing states to enact laws authorizing a meeting of their representatives to adopt a compact. Governor Marland said:

> ". . . We are confronted by the fact that the oil industry has never been satisfactorily regulated. . . . [There] has never been uniformity in the laws enacted by the . . . oil-producing states . . . . There are two theories of conservation. One . . . would hoard the natural resources. . . . The other believes this generation has a right to intelligent and efficient use of the present resources. . . but does not have the right to waste or despoil resources. . . . by reason of greed or inefficiency. Some form of

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[38]Calif. Laws 1935, c. 23; Kan. Laws 1935, c. 214, p. 304; Tex. Laws 1935, vol. 2, Concurrent Resolution No. 26; N. M. Laws 1935, c. 1; Okla. Sess. Laws 1935, c. 59.

[39]Governors Allred and Marland attended personally. The remainder were representatives from the states. Michigan and Colorado attended for the first time. Louisiana stepped out. The representative from Colorado, Mr. Downing, though not previously in attendance, strengthened the conferees by reason of his invaluable past experience in the leadership of the Oil States Advisory Committee.

> responsible regulation must be maintained [assuring] a relation between production and demand. . . . "[40]

In concluding Marland called on Allred to lead a discussion of these problems. Allred, after requesting permission, read the resolution adopted in the Legislature of Texas, under which he acted.[41] Thereafter he stated his position relative to the formation of an interstate compact, in part, in these words:[42]

> ". . . Texas was interested in the prevention of waste of oil or gas. . . and willing to cooperate to that end. . . but would not approve of any compact that had for its purpose price fixing, monopoly or regimentation of the oil industry. . . ."

An outline of the Allred compact was then read to the delegates. The sole purpose of this pact was the conservation of oil and gas by prevention of physical waste.[43]

The moment Allred limited his plan to prevention of physical waste many inquiries were made as to how he defined waste. His definition would not include overproduction of oil unless storage facilities were inadequate resulting in substantial waste of the type mentioned in *Champlin Refining Co.* v. *Corporation Commission.*[44] It was suggested to Allred that overproduction causes physical waste in using too much gas to lift each barrel of oil, leaving a great amount of unrecoverable oil in place in the sand. This type of waste he doubted was contemplated by his plan.

Mr. Bell of Illinois then posed the question, "If oil was twenty cents a barrel would that be physical waste?"[45] Allred replied this would not be waste in the sense used in his plan; nor did he think the abadonment of

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[40]At the third meeting a full transcript of the proceedings was kept. It has proven so difficult to understand because of faulty reporting that Mr. Warwick M. Downing was commissioned to prepare an abbreviated transcript of the proceedings. It will be cited hereafter as *Abbreviated Transcript. Abbreviated Transcript* (1935) 3, 4, 5-7. The week of the conference Secretary of the Interior Harold Ickes, in an article appearing in the *Saturday Evening Post,* stated:

> "There is at least some ground for the suspicion that some of the most vehement opponents of Federal control are proclaiming their belief in state compacts so as to draw the familiar red herring across the trail. They do not want Federal control, and by the same token, they do not want state control. They have no patience with any suggestion that the public has any interest at all in the oil business. They want the oil industry to run wild. So, with their tongues in their cheeks, they declare for an inter-state compact, convinced on the basis of past experience that it cannot succeed." Ickes, *After the Oil Deluge, What Price Gasoline?* (1935) 207 SAT. EVE. POST 5.

[41]The resolve stated: ". . . to accomplish the conservation of petroleum and natural gas and the prevention of physical waste . . . without price fixing." *Abbreviated Transcript* (1935) 8.

[42]*Id.* at 8-10.

[43]*Id.* at 10, and APPENDIX A for a copy of the Allred compact.

[44]286 U. S. 215, 52 Sup. Ct. 559, 76 L. ed. 1062 (1932) .

[45]*Abbreviated Transcript* (1935) 11.

thousands of small wells, with great unmined reserves, due to low prices, would be waste unless the price continued depressed for some time. On inquiry as to how best to prevent waste without balancing supply and demand factors, he stated the answer was to do as was done in Texas. There the problem was taken care of by the prevention of physical waste alone, not as a balancing of supply and demand, nor by production of oil for the existing markets solely, but by application of waste statutes limited to the prevention of physical waste.[46]

Allred recalled that the interstate compact was originally proposed by the American Petroleum Institute. That body had been a warm adherent of federal control until Ickes proposed regulation of oil from production to tank. He felt the Institute was behind all this talk of price regulation. Allred reminded Marland of newspaper articles quoting Marland as saying a compact would result in three dollar a barrel oil. He called attention to the statement the latter made during the passage of the Oklahoma enabling resolution that the act would result in oil selling at $1.50 or $2 per barrel.[47] Texas, he continued, will ". . . not be a party to any such price fixing scheme."

In replication Marland stated that in the twelve years he had attended meetings of the Board of Directors of the American Petroleum Institute, price had never been mentioned; that they ". . . religiously refrained from ever discussing price. . . ." The Board never ". . . uttered the word 'price' . . . [being] so frightened with the . . . Sherman Anti-trust Act and other acts."[48] He favored entrance into a compact designed to prevent physical waste because, ". . . frankly, I think if we prevent the waste in the fullest sense of the word 'waste' we will achieve the results I desire." Waste prevention in its fullest meaning, Marland said, results in a better price for oil.

It was apparent that Allred would not commit Texas to any " . . . price fixing scheme with the American Petroleum Institute, or anyone else, and [would not] enter into that kind of a compact because [Texas] does not believe it is right, and we believe that it is unlawful!" He charged there was a gang lined up for an interstate compact with price fixing in it to be used as a basis for unitization plans.

During the afternoon session Marland requested the representative of each state to ". . . state what legal obstacles, if any, there would be in his state to adopting the suggestion of Governor Allred." Colorado and Arkansas reported no obstacles existed in their present laws. Kansas found

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[46] *Id.* at 11, 12.
[47] *Id.* at 14, 15.
[48] *Id.* at 16, 17.

their conservation measure broad enough to cover all provisions of the compact, with the understanding that their definition of waste was contrary to that in the plan. Allred remarked his proposal would not compel any state to repeal any law—the compact would only prohibit any state from limiting production for the sole purpose of stabilizing or fixing price. It did not prevent other definitions of waste.

Delegates from the other states announced their laws did not conflict. Oklahoma stated they would go along if certain amendments which they would suggest could be secured. One of these changes would permit the Compact Commission to recommend to the states allowables and to Congress amounts of oil to be imported. Allred did not object to this provided it could be embodied in the form of a resolution rather than included in the Compact. He stated, the "thing I am afraid of is getting the matter of price into the laws of Texas, or in the Compact."

One of the Oklahoma representatives saw fit to interject into the discussion the remark that, "Conservation, no matter what you call it, the laws preventing waste, can be and are used to limit production." He accused Texas of enforcing their conservation law to stabilize price. Allred at once denied this stating, ". . . [I] am glad we are out in the open at last. I appreciate your frankness. That is the very thing we are not going to get tied into here."

Marland suggested section "g" of the paragraph defining waste be struck out. He offered in its place, viz.: "The production of oil in such excess quantities as would cause the abandonment of unmined reserves recoverable by pumping, or other artificial production methods." In an impassioned address to the conference, Allred outlined the long fight against federal control. He stated Texas, and Texas alone, went to Washington to fight that control—that they almost singlehanded opposed the passage of the Disney Bill.[49] Texas, he continued, wanted to follow the legal and safe route to true conservation rather than become a party with the Federal Government or with any sister state to a plan which might directly or indirectly have price fixing or monopoly for its purpose. The appealing suggestion about production of oil in such excess quantities as would cause the abandonment of unmined reserves was very nicely worded. But from the experience of Texas, and from Allred's experience there as

[49]This bill was never adopted.

Attorney General, he had learned that courts looked behind declarations in legislation and in acts of commissions to determine the motive.[50]

During a hiatus in the proceedings while awaiting completion of the Allred compact plan, Marland presented his draft of a convention for Conservation of the American Oil Supply.[51] He announced he had just come from a talk with the Chairman of the House Committee investigating the petroleum industry. In the course of their talk the Chairman had indicated that Congress would be glad to have the views of the conference. Marland felt the views had been "pretty clearly" stated relative to the proposal submitted by Allred. He suggested it would also be wise to have the thought of the convention on his proposal which he offered after ". . . months of grave consideration of our problem."

When Marland offered his proposal, Allred with exasperation, if not indignation, remarked he had no objection to the Chair's presenting a compact proposal at the meeting, but as it stood, his was first on the agenda. Marland hotly replied that he did not care to vote on the Allred proposal at all—what he desired was an expression of opinion on his proposal as, "We had an expression of opinion all day yesterday on your suggestion." The Kansas delegation then announced that from a study of the Marland proposal they believed, "Kansas would subscribe to this compact as proposed."

Feeling that his pact was being unjustifiably shunted aside for consideration of Marland's proposal, Allred protested. He had understood that his compact was to be voted upon and now the Chairman had suddenly presented another plan asking for discussion on it. "Already. . . states have arisen and notwithstanding the copy of this [plan] has been in my hands about thirty minutes, and yesterday morning everyone insisted upon time to read and discuss the copy of mine, and now the one I got about thirty minutes ago . . . states have said they are ready to accept." It was offered by Senator Anglin, delegate from Oklahoma, that the meeting was impliedly under an agreement to consider any resolution or suggestion offered by anyone prior to final adoption of a program.

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[50]MacMillan v. Railroad Commission, 51 F. (2d) 400 (W. D. Tex. 1931); Peoples Petroleum Producers, Inc. v. Smith, 1 Fed. Supp. 361 (E. D. Tex. 1932). Colonel Thompson in testifying before the Temporary National Economic Committee, said: "We spent about half of our time in the courthouse for about five years, in every kind of court—state courts, Federal courts. . . . We were summoned to appear one day in five different district courts, enjoined all over the state." Temporary National Economic Committee Hearings (1940) pt. 15, p. 8208. "Formerly when I would start from the hotel to the Capitol I would be enjoined. . . . One time I was enjoined seven times between the hotel and the Capitol by different people. . . ." *Transcripts of the Interstate Oil Compact Commission* (1930) 30.

[51]See APPENDIX. *Abbreviated Transcript* (1935) 37-40.

Coincident with this flurry of exchange between Oklahoma and Texas, Allred stated that no doubt if, "Two or three words had been put into the compact [his proposal] it would have been adopted and over with last night, and that is the purpose of the vote this morning with the Governor of Oklahoma." He again mentioned he did not know when the proposal of Governor Marland was written—it had only reached him thirty minutes ago—but a casual perusal of it was convincing that its purpose was to introduce into the compact the very thing Texas, and he, had opposed since the first Ponca City meeting—the fixing of prices.

Marland demanded to be shown in what part the words "price fixing" were used, to which Allred replied they are contained in paragraphs one and two. On being queried wherein they appeared in the context of these paragraphs, Allred stated, ". . . Well, you just read it, Governor." It was not necessary, Governor Allred remarked, to put ". . . price into it to have price in mind, and that is just what you have, Governor; you admitted that yesterday morning; that is what you are after . . . and that is the purpose of this. I compliment you upon your phraseology of it, but it is in here."

After this conflict and with much arduous work, a compromise proposal worked out by a committee headed by Mr. Downing of Colorado, was offered the conference and adopted.[52]

WAS IT A COMPROMISE?—A COMPARATIVE ANALYSIS OF ALLRED, MARLAND AND ADOPTED COMMITTEE COMPACTS

Study of the terms set forth in the compacts of Marland and Allred in comparison with the final convention[53] adopted February 16, 1935, at Dallas, discloses little compromise. What Mr. Downing terms a compromise between the two positions turns out to be small compromise indeed. A close consideration of the agreements, side by side, shows the wording of the Allred and Committee papers to be identical in most instances, and in those places where actual words differ, the meaning remains the same.

Article One in both deals with the effective date of the agreement, and while not alike in term, provides that it shall become effective when approved and ratified. The adopted compact further states that ratification

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[52]The Committee was composed of Mr. Warwick M. Downing, Colorado, Chairman, Senator Tom Anglin of Oklahoma, and Judge Fouts of Texas. The Compact was unanimously adopted with some qualifications. Kansas felt the agreement did not go far enough but would vote for it rather than disappoint the meeting. California's aye vote was qualified in that the agreement did not include those matters which their representative was to ask for. With the vote, the Compact came into being February 16, 1935. *Abbreviated Transcript* (1935) 53.

[53]For a full text of the Allred, Marland and Committee Compacts, see APPENDIX.

must be made by three of the states of Texas, California, Oklahoma, Kansas and New Mexico, and sets out a means by which non-member states may join the agreement. Article Two establishes as the sole purpose of the agreements the conservation of oil and gas by prevention of physical waste. The third Article binds each jurisdiction to enact within a reasonable time, if such laws have not been enacted, laws preventing waste. The causes of waste are enumerated in identical terminology except that the committee proposal dropped section "g" relating to the open storage of oil or its destruction at the surface. Article Four obligates the states to enact laws, or if such be in force, to retain them providing that petroleum produced in violation of the waste statutes be denied access to commerce. The committee convention added to this petroleum produced in violation of valid rules, regulations or orders promulgated under the authority of state oil and gas conservation laws, and inserted stringent penalties for waste of oil and gas.

Article Five of both pacts commits the compact organization to the program of conserving oil and gas by preventing the avoidable waste thereof within reasonable limitations. No authorization is found in the terms of the pacts for stabilizing or fixing the price of oil and gas by limitation of production; the promotion of regimentation or the perpetuation of monopoly within the industry. In Article Six, the authors of the various agreements outline the governing boards or commissions to be created by the contract between the states—Allred denominating it the Oil States Conservation Board, the Committee the Interstate Oil Compact Commission. Basic provisions of these Articles are so akin the only differentiation is a choice of words. One exception is in the adopted agreement wherein a power is vested in the Commission to recommend the coordination of the police powers of the several states to promote maximum ultimate recovery. In this Article a change was made from the original proposal that the vote by states be based on their ability to produce oil in relation to the entire production within the states. This was revamped in the Committee agreement with Allred's consent, to provide that no action could be taken without an affirmative vote of the majority of the whole number of compacting states present at any meeting, and by a concurring vote of a majority in interest of the states attending—their interests to be computed by the ratio of the proportionate average production of each state to the daily average production of the compacting states during the preceding calendar half year. Actually what effect this would have in case of a close vote is doubtful.[54] Its insertion did much to allay

[54]Action has always been unanimous or so nearly so that the voting formula is not called in play.

the fears of other states that Texas would control any action under the pact. Articles Seven and Eight are identical in each agreement with the exception that in the Committee agreement the effective date is changed and a more extensive formal statement relative to the execution of the agreement is adopted.

In contrast to these two papers, Marland's proposed *Conservation of the American Oil Supply* ranged farther afield. It differed in almost all respects from the other two, and in many of its provisions was more effective. It is distressing to find that more compromise between the two positions was not made, and that much of the thought worked out in his proposal was not incorporated in the final draft. However, in his post of presiding officer of the Commission, he did much to impress these excellent ideas on the future action of the group.

When the conference convened, weight of opinion, both in the conference personnel, in industry trade journals and in the newspapers, preponderately favored the Marland proposals (though few people supposedly knew their actual terms). Marland's consistent advocacy of his position at prior meetings in his home in Ponca City, his public statements to the press and before the Oklahoma Legislature or before the Congress, gave ample knowledge of his desires. What caused Marland to give in so suddenly after his stubborn fight? On the closing afternoon of the conference why did he abandon a plan—one on which he had worked over a long period of time with the assistance of leaders in state and national conservation—a plan supported by persons of all range of opinion in the industry—in favor of Allred's proposal?

True it had become apparent to the most ardent supporter of price control that Allred would never countenance the entrance of Texas into any compact not inveighing against price fixing, monopolistic control and regimentation. Texas with its great producing capacity, could and would flood the other states in oil from its unrestrained production should she refuse to join in a compact. Texans boasted that they could alone meet the entire domestic and foreign demand for petroleum. It would be difficult to argue this did not weight the scales toward a compromise plan. Yet, one must recall that public opinion was steadily moving towards federal regulation of the petroleum industry if it could not bring about its own reform. This worked as a club over the recalcitrant Texans because they disliked federal control far more than any other state.

The solution may be found in the comparative study of the three proposals and the statements adduced at the final day of the Dallas meeting. In the last analysis the answer hinges on two considerations: 1. The

definition to be given in each jurisdiction to the words "physical waste"; 2. The adoption in the Committee proposal of the purpose set forth in Article One of Marland's pact in Article Six of their concord, as a recommended power of the Interstate Oil Compact Commission, viz.:

> "Purposes: By this compact . . . undertake to voluntarily coordinate the exercise of [the] police power within their several jurisdictions to promote the maximum ultimate recovery from the petroleum reserves of the nations."

Either at the time of adoption of the Compact, or shortly thereafter, many jurisdictions had on their statute books laws defining physical waste and included in their definition provisions similar to the one adopted in Oklahoma, viz.:

> "Waste Defined—Regulations to prevent—The term 'waste' as used herein, in addition to its ordinary meaning, shall include economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or of marketing facilities or reasonable market demands. . ."

or the statute adopted by the State of New Mexico shortly before the Dallas meeting, viz.:

> "Production of crude petroleum in excess of reasonable market demand is waste."

These market demand laws were not new in the older Mid-Continent oil producing areas; therefore many of the compacting states had a statutory system which might allow, in substance, price stabilization, price rigging, price fixing, regulation of the laws of supply or demand, or whatever one chooses to call their ultimate effect—all under the guise of defining waste of petroleum and gas.

When the question was before the conference as to the effect of the compact upon the various market demand laws with reference to the variance in definition between that instrument and these statutes relative to "physical waste," Allred said of his agreement:[55]

> "This proposed Compact would not compel you to repeal any laws, so far as I know, that you have, but it says the Compact will not authorize you or Texas to limit the production of oil and gas for the purpose of stabilizing and fixing price. I am sure it will not interfere with your right to do so. I don't want to get anything in here to impair the validity of the orders of the Railroad Commission because you have a market demand statute in Oklahoma. This proposed Compact isn't exclusive and doesn't prevent any other definition of waste."

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[55] *Abbreviated Transcript* (1935) 20.

It would seem that Allred realized each state could interest itself in activities within the areas of price stabilization providing such methods were sustainable in the local courts. What he desired to prevent was the use of the compact framework to integrate and extend these pricing interests on the part of the states, and assure it would not be used to create an effective, cooperative manipulation of the supply of petroleum to correspond with the demand. Advocates of Marland's theory wanted to correlate such actions on a national scale to increase their effectiveness in order to remove chances of neighboring states' profiting by producing during periods of restricted supply. No doubt, at this time, these groups began to perceive that they could have their compact agreement along lines Texas would approve, and price fixing also by manipulating individual state concepts of "physical waste" into appropriate definitions. The readiness to enter into the Allred proposal can be definitely attributed, in part, to the fact that most states had market demand laws, and those that did not intended to have them as soon as their legislative groups met. These men planned to return home and use these laws to restrict production as effectually as possible, trusting that public opinion, future meetings and higher prices would encourage Texas to redefine "physical waste."

Coupled with this was the introduction into the compromise proposal of the purpose set forth by Marland in the *Conservation of the American Oil Supply*—voluntary coordination of police power to promote maximum ultimate recovery from petroleum reserves. What Marland meant by promotion of maximum ultimate recovery is clear, as his ideas run all through the transcripts of the formative meetings and of the first sessions while he acted as the Chairman of the Compact Commission. It had been his intent to redefine waste by adding a section to the Allred pact, viz.:

> "The production of oil in such excess quantities as would cause the abandonment of unmined reserves. . . . "

At another time he remarked that the ". . . greatest waste will be the waste of 75% of unmined reserves of the United States unless we do curtail production from flush fields. . . . Unless we curtail production from flush fields we will destroy a great majority of the unmined reserves. . . ." It is axiomatic that any great curtailment of flush production would have a definite bearing on price in the industry. Marland had this sort of price adjustment in mind. Allred accused him of such a mental state in discussing the Marland proposal.

THE INTERSTATE COMPACT TO CONSERVE OIL AND GAS

On August 9th, 1935, after ratification of the Interstate Compact to Conserve Oil and Gas by the States of New Mexico, Oklahoma, Kansas,

Colorado, Texas and Illinois, President Roosevelt transmitted a certified copy of the agreement (the original having been deposited in the office of the Secretary of State) to the Seventy-fourth Congress meeting in its first session, and recommended legislation be there enacted giving the consent of that body to the Compact.[56] The Presidential message was received in Congress on the legislative day of July 29 (calendar day of August 9, 1935), read, ordered to lie on the table and to be printed.

After that 16th day of February, 1935, when the Compact was executed by representatives of the state of Oklahoma, Texas, California, and New Mexico, and recommended for ratification by those conferees present from the states of Arkansas, Colorado, Illinois, Kansas and Michigan, the advocates of the Compact worked with unceasing diligence to secure favorable action by state legislatures. Fortunately, 1935 being an odd year, these state organizations were in session at the time of the agreement's execution (having convened in the early days of January). New Mexico became the first state formally to pass legislation ratifying the action of its representatives in signing the agreement, their action taking place February 25, ten days after the Dallas meeting.[57] Oklahoma followed with an enabling enactment on March 6,[58] Kansas on March 13,[59] Colorado and Texas on April 15[60] and Illinois, the last state to ratify the original agreement, July 10, 1935.[61] The Legislature of the State of California though authorizing attendance of a representative at the Dallas meeting and keeping an observer at the early sessions of the Compact Commission, took no steps to ratify the agreement, but maintained, as one Californian has said, toward the Compact, ". . . about the same attitude as the United States Government has toward the League of Nations."[62] The representatives from California thus were unable to fulfill the obligation created by execution of the pact. California was the only state going so far as to execute the agreement, and thereafter not able to carry its adoption to completion. Michigan, though recommending passage of the necessary legislation, failed during 1935 to push the plan through the Michigan legislative body.

The message from President Roosevelt was referred to the Sub-Committee of the Committee on Interstate and Foreign Commerce engaged in

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[56]H. R. Exec. Doc. No. 118, 74th Cong., 1st Sess. (1935).
[57]N. M. Laws 1935, c. 128, p. 312.
[58]Okla. Sess. Laws 1935, c. 59, p. 241.
[59]*Id.* c. 215, p. 305.
[60]Colorado: Laws 1935, p. 1174, Senate Joint Resolution No. 18; Texas: Laws 1935, c. 81, p. 198, vol. 1.
[61]Illinois: Smith-Hurd Rev. Stat. (1935) 104-19.
[62]Marshall, *Legal History of Conservation of Oil and Gas in California*, Legal History of Conservation of Oil and Gas (1938) 28, 29.

the investigation of the petroleum industry. Legislation giving the requisite consent of Congress to the formation of the Compact was included in the provisions of HR 9053[63]—the portion relative to consent being set forth in Section One. The delay in the Committee in presenting the Bill to the Seventy-fourth Congress was occasioned, it was officially stated, by an honest desire on the part of Congress, the President and others, to work out a more satisfactory bit of legislation—legislation not solely authorizing the compact but also including other matters of importance to the petroleum industry. The bill turned out to be one attempting to insert most of the provisions objected to during the formation of the agreement in Dallas, into the consent statute.

Bill HR 9053, in short, provided for the ratification of the interstate agreement. As the Report of the Committee on Interstate and Foreign Commerce states, ". . . the compact itself is not the strongest document of that kind that could be drawn, but that it is an initial effort on the part of the oil producing states to meet, in a constitutional way, the prevention of waste." Thereafter the bill proceeded to supply those missing and stronger ideas, in the opinion of the Administration, needed to make the law, "the strongest document" possible. The bill, in its second section, created an agency of the Federal Government known as the Petroleum Administrative Board, whose powers, duties and functions were set forth in detail in Section Three. The Board was to be an agency of the entire country, as distinguished from an agency of the compacting states alone, but charged with cooperating in all helpful ways with the interstate groups to carry out the purposes of the compact. In addition the Board was to ascertain and know at all times the status of petroleum reserves and supply in America, to study and investigate the discovery and orderly development of all sources of petroleum and improved methods of production, to determine the total demand for petroleum, including domestic needs, additions to storage and export requirements. Advisory allowables, with much stress upon the word "allowable" would be established for each producing state.

Administration of the tender features of the Connally Bill would be assigned to the Board as set out in Section Four of the bill. The fifth section covered regulation of imports of petroleum and products whenever the importation was found to interfere with the program outlined under the bill. Provisions of the sixth section outlined the execution of voluntary industrial agreements exempting the parties thereto from the penalties of the anti-trust laws where the subject of the agreement fell within the categories set forth in the bill and received the approval of the President

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[63]H. R. Rep. No. 1801, 74th Cong., 1st Sess. (1935).

of the United States, an attempt to revive some of the activities of the National Industrial Recovery Act.

With the introduction of this bill and the recommendation of the Cole Committee that it pass, presented in the House on August 14, 1935, a storm of protest arose from the proponents of the compact, many of whom espoused the principles outlined in that agreement because of their ardent hatred of federal control—now reappearing bit by bit in the sections of the proposed enactment. The bill, it is true, did give consent to the formation of the compact by member states, but in addition, it attempted to incorporate and tack on the most objectionable features contained in the past proposals rejected at the Dallas meeting. What the members of the compact expected was but a simple resolution of the Congress giving consent to the product of their labors. What they got was full and complete federal participation in the business of petroleum production.

The engrafting of these unpopular provisions, designed to allow joint federal participation with the states in the production control of petroleum and its production within the states, on to that portion of the proposed law giving consent to the compact, did not meet with support from the portion of the industry opposed to federal control, participation and interest in the industry. As protest and bickering over the provisions of the bill increased in hostility and bitterness, the necessary Congressional reaction was secured. The co-sponsors of the legislation (to escape the ignominy of scuttling the efforts of their own state—Oklahoma—in the compact) proposed abandonment of the controversial bill and substituted in its place, a resolution, Public Resolution No. 64, which merely consented to the formation of a compact between the states.[64] Final approval was received on August 27, 1935. This shift was forced by public opinion in the industry. It constituted a rebuke of some magnitude to the Administration, the sponsors of the bill, the Cole Committee, and the die-hard group within the Department of the Interior fighting unceasingly to gain control of the production of petroleum. The widely, and it must be said, falsely proclaimed necessity of securing legislation to control and supervise the action of the Interstate Compact group was suddenly found to be, of necessity, much less than originally supposed. Senator Thomas and Representative Disney of Oklahoma, were again placed in the embarrassing position of sponsoring legislation which did not meet with the approval of a majority of their constituents engaged in the petroleum industry—a not unusual position for either. After the granting of the Congressional permission, with the signature of President Roosevelt, the Interstate Compact to Conserve Oil and Gas officially came into existence.

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[64]House Resolution No. 407, 74th Cong., Aug. 27, 1935.

Together with the original member states, other states have from time to time ratified the original compacting agreement. Michigan, one of the original jurisdictions to recommend the compact for adopton, after attending many meetings in an observer status, entered the organization on May 25, 1939. Although the Commission worked from 1935 on to secure favorable consideration in Arkansas, their efforts did not culminate in success until June 4, 1941.[65] Membership increased with the addition of Louisiana, June 23, 1940,[66] Pennsylvania, July 23, 1941,[67] and New York, July 25, 1941.[68] Kentucky formally joined on January 27, 1942,[69] Ohio on May 14, 1943,[70] and Montana, West Virginia, Alabama and Florida in 1945.[71] During the existence of the agreement from 1935 to the present date no member state has exercised the privilege retained in the agreement to withdraw upon sixty days notice. Present membership stands at seventeen of the oil producing states. Others maintain representation at the Commission table through the medium of accredited representatives.

The Compact, by its own terms, expires every two years from the original termination date of September 1, 1937—a provision that has caused much speculation. The Report in 1942 of the Compact Extension Committee of the Interstate Compact Commission would lead one to believe the limiting clause was occasioned ". . . because the Connally Act was a two-year statute and the Texas conservation law was enacted for two-year periods." A reexamination of the law relating to Congressional consent raises a presumption that this time limit was used to woo assent. In Congress the compact has been renewed four times by joint resolution. The most recent extension runs until September 1, 1947.

APPENDIX

An Interstate Compact to Conserve Oil and Gas[1]

Article I.

This Agreement shall be effective as between the several States producing oil and gas which join herein as of the several dates of their execution hereof under the direction of their respective Legislatures, or as

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[65]Ark. Acts 1941, No. 86, p. 949.
[66]La. Acts 1940, No. 411, p. 1402.
[67]Pa. Pamphlet Laws 1941, No. 435.
[68]N. Y. Laws 1941, c. 501.
[69]Ky. Laws 1942, c. 267, p. 973.
[70]Ohio Laws 1943, SB No. 160.
[71]Mont. Laws 1945, Act 271; W. Va. Laws 1945, Concurrent Resolution No. 20; Ala. Laws 1945, Joint Resolution; Fla. Laws 1945, c. 22823.

[1]This copy of the Allred compact was furnished the writer from the personal files of the Honorable James V. Allred of Houston and is an exact copy of the agreement offered by him at the organizing meeting in Dallas.

of the effective date of an Act of Congress consenting to this compact, whichever is last in *occurrence*.

Article II.

The sole purpose of this compact is to conserve oil and gas by the prevention of physical waste thereof.

Article III.

Each State bound hereby agrees that at or before the time of approval by it of this compact, it will enact statutes, or if statutes have been enacted, then it agrees to continue the same in force to accomplish within reasonable limits the prevention of physical waste of oil and gas. Without excluding physical waste in any form, for the purposes of this compact waste is defined to be:

(a) The operation of any oil well with an inefficient gas-oil ratio.
(b) The drowning with water of any stratum capable of producing oil or gas, or both oil and gas in paying quantities.
(c) The avoidable escape into the open air or the wasteful burning of gas in a natural gas well.
(d) The creation of unnecessary fire hazards.
(e) The drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof.
(f) The inefficient, excessive or improper use of the reservoir energy in producing any well.
(g) The open storage of oil or the avoidable loss and destruction thereof after the same reaches the surface.

Article IV.

Each State bound hereby agrees that at or before the time of approval by it of this compact it will enact statutes, or if such statutes have been enacted then that it will continue the same in force, providing in effect that oil produced in violation of the provisions of the statutes provided for in Article III shall be denied access to commerce; and providing for stringent penalties for the waste of either oil or gas.

Article V.

This compact does not authorize the States joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof, or for the purpose of balancing supply and demand, or to create or perpetuate monopoly, or to promote regimentation, but is limited to the

sole purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations.

Article VI.

Each State joining shall appoint one representative to a board hereby constituted and designated as the Oil States Conservation Board, the duty of which board shall be to make inquiry and ascertain from time to time such improved methods as may be disclosed for bringing about conservation and the prevention of physical waste of oil and gas, and at such intervals as said board deems beneficial it shall report its findings and recommendations to the several States for adoption or rejection. Said board shall organize and adopt suitable rules and regulations for the conduct of its business, but in all meetings of said board and in the conduct of all business thereof, the vote of each representative shall count in the decimal proportion which the potential production of his State bears to the total potential production of all States bound by this compact, a majority of the decimal percentage representing the total potential production of all said States to control.

Article VII.

No State by joining herein shall become financially obligated to any other State, nor shall the breach of the terms hereof by any State subject such State to financial responsibility to the other States joining herein.

Article VIII.

This compact shall expire on June 1, 1937, and any State joining herein may, upon sixty (60) days notice, withdraw herefrom.

This writing shall be executed in one original, which together with supporting authorization of the representative executing for each several State, shall be deposited in the office of the Secretary of State of the United States, at Washington, D. C.

Conservation of the American Oil Supply[2]

The States of [here were to be inserted the names of the compacting oil States] having resolved to enter into an agreement pursuant to Section 10, of Article 1, of the Constitution of the United States, subject to the consent of the Congress of the United States, have caused representatives to be duly appointed, who have agreed upon the following articles:

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[2]Oil States Compact: Conference of Governors Held. . . When the Interstate Oil Compact Was Agreed to . . . . *Abbreviated Transcript of Proceedings, pp. 37 et seq.*

1. Purposes. By this compact certain of the oil producing states, recognizing that regulation by the State is essential to the conservation of oil and gas, undertake voluntarily to coordinate the exercise of the police power within their several jurisdictions to promote the maximum ultimate recovery from the petroleum reserves of the Nation.

2. The Interstate Oil Conference. There is hereby established a cooperative fact finding agency designated as the Interstate Oil Conference. It shall consist of one representative of each state party to this agreement, appointed by the governor thereof or in such other manner as such State may provide. The Conference shall meet at least quarterly on March 10, June 10, September 10, and December 10, at such places as it may fix, or oftener upon the call of the Governors of three or more compacting states. The conference shall prescribe its by-laws, and procedure, and elect its officers, and perform the duties prescribed by this agreement.

3. Duties of the Conference. The Conference is authorized and directed: 1. to make findings, quarterly, or oftener, of the quantity of oil currently required for consumption within the United States, and for export; to receive and consider data which the regulatory agency of each compacting state may furnish as to the rate at which oil may be produced in such state, without waste; and to recommend to each compacting state the relative part of the total demand for domestic production which may be produced without waste in such state. 2. To draft measures for the maximum ultimate recovery of oil and gas, which it shall recommend for consideration by the legislatures of the several compacting states. 3. To receive from the several compacting states data on refinery runs and shipments of gasoline and other products of petroleum taxed by them, and to publish such data for the mutual assistance of the states in checking tax evasions. 4. To draft and recommend uniform taxation measures. 5. To cooperate in fact-finding activities with such Federal agencies as the Congress may authorize.

4. Action by the States. Each of the compacting States agrees that:

1. Prior to each convening of the Interstate Oil Conference, the State shall cause to be held such hearing or other proceedings as may be required by its local law as a prerequisite to a determination of the quantity of oil that may be produced under its laws without waste. The data so assembled, together with such recommendations as the State Conservation Agency may submit, shall be laid before the Conference.

2. It will receive and consider the findings and recommendations of the Conference with regard to the requirements for oil production and the quantity which the Conference finds may be produced in each State without waste, and will give such effect

to the recommendations of the Conference thereon as may be consistent with the powers and duties of the local conservation agency under the laws of the State.

3. It will designate a qualified member of the Conference, procure his attendance therein, pay his expenses, and contribute equally with the other compacting states to the general expenses of the Conference in an amount not to exceed..... Dollars annually from each State.

5. Action by the United States. Control and limitation of importations of oil and products thereof is essential to the preservation of production from certain areas within the United States. The Congress is requested to effect limitations of imports in such a manner that the total thereof does not exceed the equivalent of.....per cent. of the total demand for consumption within the United States and for export as found by the Conference.

6. Effective Date; New Parties. This agreement may become effective within any compacting State at any time as prescribed by that State, and shall become effective within those states ratifying it whenever any three of the States of Texas, Oklahoma, California, Kansas and New Mexico have ratified and Congress has given its consent. Any oil producing State may become a party hereto by ratification hereof and notification to the other States which are parties at that time.

7. Termination or Suspension. Any State may withdraw from this agreement upon written notice to the then parties, in which event the compact shall remain in force as to the other parties. This agreement may be terminated at any time by the consent of the majority of the States then parties to it, and may be terminated in such other manner as Congress may prescribe.

8. This agreement rests upon the comity of the Sovereign parties and upon their voluntary cooperation. No State shall be subject to suit in court on account of any provision which may be contained herein; no provision of this compact shall be enforced within any State except by its own Government.

9. Commerce. Nothing in this agreement shall impair the power which any State may have to regulate commerce in oil and gas within its borders nor with the power of the United States to regulate commerce with foreign nations and among the several states.

10. Signatures. The representatives of the signatory states have signed this agreement in a single original which shall be deposited in the archives of the Department of State of the United States, and duly

certified copy shall be forwarded to the Governor of each of the signatory states. Signature on behalf of any State hereafter becoming a party hereto may be affixed to a counterpart to be similarly deposited and certified.

Done in the City of Dallas, this the.....day of February, 1935.

An Interstate Compact to Conserve Oil and Gas[3]

Article I.

This agreement may become effective within any compacting state at any time as prescribed by that state, and shall become effective within those states ratifying it whenever any three of the States of Texas, Oklahoma, California, Kansas and New Mexico have ratified and Congress has given its consent. Any oil producing state may become a party hereto as hereinafter provided.

Article II.

The purpose of this Compact is to conserve oil and gas by the prevention of physical waste thereof from any cause.

Article III.

Each state bound hereby agrees that within a reasonable time it will enact laws, or if laws have been enacted, then it agrees to continue the same in force, to accomplish within reasonable limits the prevention of:

(a) The operation of any oil well with an inefficient gas-oil ratio.

(b) The drowning with water of any stratum capable of producing oil or gas or both oil and gas in paying quantities.

(c) The avoidable escape into the open air or the wasteful burning of gas from a natural gas well.

(d) The creation of unnecessary fire hazards.

(e) The drilling, equipping, locating, spacing or operating of a well or wells so as to bring about physical waste of oil or gas or loss in the ultimate recovery thereof.

(f) The inefficient, excessive or improper use of the reservoir energy in producing any well.

The enumeration of the foregoing subjects shall not limit the scope of the authority of any state.

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[3]This is an official copy of the Compact as taken from the Commission records and is the compromise compact of the Downing Committee.

Article VII.

Each state bound hereby agrees that it will, within a reasonable time enact statutes, or if such statutes have been enacted, then it will continue the same in force, providing in effect that oil produced in violation of its valid oil and/or gas conservation statutes or any valid rule, order or regulation promulgated thereunder, shall be denied access to commerce; and providing for stringent penalties for the waste of either oil or gas.

Article V.

It is not the purpose of this Compact to authorize the states joining herein to limit the production of oil or gas for the purpose of stabilizing or fixing the price thereof, or create or perpetuate monopoly, or to promote regimentation, but is limited to the purpose of conserving oil and gas and preventing the avoidable waste thereof within reasonable limitations.

Article VI.

Each State joining herein shall appoint one representative to a commission hereby constituted and designated as the Interstate Oil Compact Commission, the duty of which Commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about conservation and the prevention of physical waste of oil and gas, and at such intervals as said Commission deems beneficial it shall report its findings and recommendations to the several states for adoption or rejection.

The Commission shall have power to recommend the coordination of the exercise of the police power of the several states within their several jurisdictions to promote the maximum ultimate recovery from the petroleum reserves of said states, and to recommend measures for the maximum ultimate recovery of oil and gas. Said Commission shall organize and adopt suitable rules and regulations for the conduct of its business.

No action shall be taken by the Commission except: (1) By the affirmative votes of the majority of the whole number of the compacting states, represented at any meeting, and (2) by a concurring vote of a majority in interest of the compacting states at said meeting, such interest to be determined as follows: Such vote of each state shall be in the decimal proportion fixed by the ratio of its daily average production during the preceding calendar half-year to the daily average production of the compacting states during said period.

Article VII.

No state by joining herein shall become financially obligated to any other state, nor shall the breach of the terms hereof by any state subject such state to financial responsibility to the other states joining herein.

Article VIII.

This Compact shall expire September 1, 1937. But any State joining herein may, upon sixty (60) days' notice, withdraw herefrom.

The representatives of the signatory states have signed this agreement in a single original which shall be deposited in the archives of the Department of State of the United States, and a duly certified copy shall be forwarded to the Governor of each of the signatory states.

This Compact shall become effective when ratified and approved as provided in Article I. Any oil producing state may become a party hereto by affixing its signature to a counterpart to be similarly deposited, certified and ratified.

Done in the City of Dallas, Texas, this sixteenth day of February, 1935.

JEHOVAH'S WITNESSES AND THE FEDERAL CONSTITUTION

*Huey B. Howerton**

Barron v. Baltimore[1] to all intents and purposes has been overruled. It will be recalled that in this leading decision, Chief Justice Marshall delivered the opinion of the Court holding that the Fifth Amendment and the other articles in the Bill of Rights of the Federal Constitution were limitations only on the National Government. By a series of "inclusions and exclusions" the United States Supreme Court has, however, been reading into the Fourteenth Amendment, particularly the due process and equal protection clauses, a series of limitations on state action enforceable through federal intervention comparable to a large extent to the limitations on the federal government found in the Bill of Rights of the Federal Constitution. Particularly is this applicable to the relation of the First and Fourteenth Amendments. This reading-in process, however, has not been extended to include the rule that whatever constitutes a limitation on the federal government by the Bill of Rights is likewise a limitation on state action by way of the Fourteenth Amendment.[2]

In view of the fact that the First and Fourteenth Amendments are involved in the discussion of the constitutional law as developed in the cases to be analyzed, it will be well to quote the First Amendment in full and the first section of the Fourteenth Amendment.

The First Amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[3]

The pertinent part of the Fourteenth Amendment reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immuni-

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*B. S. 1915, Miss. State; M. A. 1924, U. of Miss.; M. A. 1934, Ph. D. 1943, U. of Texas. Head of Department of Political Science, University of Mississippi.

[1] 7 Pet. 243, 8 L. ed. 672 (U. S. 1833).

[2] See Palko v. Connecticut, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. ed. 288 (1937).

[3] U. S. CONST. AMEND. I.

> ties[4] of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[5]

We now turn to a consideration of some of the more important cases involving Jehovah's Witnesses, limiting the discussion to a consideration of those cases that have been appealed to the United States Supreme Court from the court of last resort in the states. The cases will be considered chronologically.

The first case appearing before the Court was that of *Lovell v. City of Griffin, Georgia,*[6] involving the distribution of religious literature in violation of a municipal ordinance which required a permit from the city manager prior to such distribution. The ordinance covered distribution, by hand or otherwise, of circulars, advertising, or literature of any kind, whether delivered or sold. A violation of the ordinance was to be considered a nuisance and punished as such. Appellant admitted distributing a pamphlet or magazine in the nature of a religious tract setting forth the gospel of the "Kingdom of Jehovah." No permit was applied for since this would have been for appellant "an act of disobedience to His commandment."

The Court, speaking through Chief Justice Hughes, invalidated the ordinance. Whether a federal question had previously been presented and decided is itself a federal question.[7] Freedom of speech and freedom of the press, which are protected directly by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected through judicial interpretation by the Four-

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[4]See Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 44 L. ed. 597 (1900), and Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97 (1908), in which the Court has made it clear that neither freedom of speech or press nor any of the other guarantees of the federal Bill of Rights is included in the lists of privileges and immunities of citizens of the United States which the states are forbidden by the Fourteenth Amendment to abridge. See CUSHMAN, LEADING CONSTITUTIONAL DECISIONS (1940) 85-87, where a brief but good discussion will be found on the general points of constitutional law involved.

[5]U. S. CONST. AMEND. XIV, § 1.

[6]303 U.S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938).

[7]The Court is referring here to a previous consideration of the municipal ordinance passed on in Coleman v. City of Griffin, 302 U.S. 636, 58 Sup. Ct. 23, 82 L. ed. 495 (1937), in which case the question of freedom of speech and of the press had not been properly presented. As to whether a federal question has been presented or not which in itself is a federal question, see Carter v. Texas, 177 U.S. 442, 447, 20 Sup. Ct. 687, 44 L. ed. 839 (1900); Ward v. Board of Comm'rs of Love County, 253 U.S. 17, 22, 40 Sup. Ct. 419, 421, 64 L. ed. 751 (1920); First National Bank v. Anderson, 269 U.S. 341, 346, 46 Sup. Ct. 135, 137, 70 L. ed. 295 (1926); Schuykill Trust Co. v. Pennsylvania, 296 U.S. 113, 121, 56 Sup. Ct. 31, 35, 80 L. ed. 91 (1935).

teenth Amendment from invasion by state action.[8] The judicial application of this constitutional protection is the interesting aspect surveyed herein.

A municipal ordinance adopted under state authority constitutes state action and is within the prohibition of the amendment.[9] The ordinance was not limited to "literature" that was obscene or offensive to public morals or that advocated unlawful conduct; nor was the suggestion made before the Court that the literature distributed by appellant in the case was of that character. It was not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuses of the streets.

Liberty of the press necessarily embraces pamphlets and leaflets which of themselves have been weapons in the defense of liberty. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. Nor could the ordinance be upheld because it related to distribution and not to publication, since the latter would be of no consequence and benefit without the former. It was invalid on its face in that whatever the motive behind its adoption, it struck at the very foundation of freedom of the press by subjecting it to license and censorship in its baldest form.

The decision of the Court was unanimous; however, Mr. Justice Cardozo took no part in consideration of the case.

The next case to come before the Court involved the distribution of handbills. Protection of freedom of press and speech was made more secure in *Schneider v. Irvington.*[10] Four cases were merged in the *Schneider* case, all of them involving the validity of municipal ordinances forbidding the distribution of handbills in the streets or other public places.[11]

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[8]See Gitlow v. New York, 268 U.S. 652, 666, 45 Sup. Ct. 625, 629, 69 L. ed. 1138 (1925); Stromberg v. California, 283 U.S. 359, 368, 51 Sup. Ct. 532, 535, 75 L. ed. 1117 (1931); Near v. Minnesota, 283 U.S. 697, 707, 51 Sup. Ct. 625, 627, 75 L. ed. 1357 (1931); Grosjean v. American Press Company, 297 U.S. 233, 244, 56 Sup. Ct. 444, 80 L. ed. 660 (1936); De Jonge v. Oregon, 299 U.S. 353, 364, 57 Sup. Ct. 255, 259, 81 L. ed. 278 (1937); Palko v. Connecticut, 302 U.S. 319, 58 Sup. Ct. 149, 82 L. ed. 288 (1937).

[9]Raymond v. Chicago Union Traction Co., 207 U.S. 20, 28 Sup. Ct. 7, 52 L. ed. 78 (1907); Home Telephone and Telegraph Co. v. Los Angeles, 227 U.S. 278, 33 Sup. Ct. 312, 57 L. ed. 510 (1913); Cuyahoga River Power Company v. Akron, 240 U.S. 462, 36 Sup. Ct. 402, 60 L. ed. 743 (1916).

[10]308 U.S. 147, 60 Sup. Ct. 146, 84 L. ed. 155 (1939).

[11]The ordinances involved were those of the muncipalities of Los Angeles in *Young v. California,* Milwaukee in *Snyder v. City of Milwaukee,* Worchester in *Nichols v. Massachusetts,* and Irvington, N. J., in *Schneider v. Irvington,* cited *supra* note 10. While *Schneider v. Irvington* alone involves Jehovah's Witnesses, the other three cases are pertinent so far as the constitutional point of law is concerned. The Los Angeles ordinance listed a number of things included in the term "hand bill" and

The Irvington, New Jersey, ordinance went still further by forbidding canvassing or distribution of literature from house to house without written permission from the police. In securing this permission from the police, a number of administrative details had to be complied with. The appellant was a member of the Watch Tower Bible and Tract Society and certified by the Society as being one of Jehovah's Witnesses and an ordained minister. She visited from house to house at all hours of the day and night distributing booklets and requesting contributions of funds for furtherance of the cause.

The Court, speaking through Mr. Justice Roberts with Mr. Justice McReynolds dissenting, invalidated the ordinance on the ground that it deprived appellant of freedom of speech and press. A municipality may enact regulations in the interest of public safety, health, welfare, or convenience; municipal authorities as trustees for the public must keep their communities' streets open and available for movement of people and property; a municipality may enact a regulation against throwing literature broadcast in the streets; but such regulations or ordinances must not violate the individual liberty secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

The ordinance in this case was not limited to those persons who canvass for private profit; nor was it a general ordinance prohibiting trespassing or preventing fraud, both of which may be forbidden. The streets and homes are effective places for the dissemination of information or opinion. It was the abuse of such rights in England which eventuated in the establishment of the doctrine of the freedom of the press and speech embodied in the Constitution. When there is required a prior censorship through a license granted or withheld at the discretion of police officials for distributing religious tracts from house to house, freedom of speech and

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forbade their distribution in the streets, parks, sidewalks, street cars, automobiles or other vehicles. The state court upheld the ordinance as being a reasonable exercise of the power of the municipality to prevent the littering of the streets through an indiscriminate distribution of the handbills. The state court distinguished the case from *Lovell v. Griffin,* cited *supra* note 6, on the ground that in the instant case the city ordinance involved forbade the distribution of printed matter in a very limited number of places, whereas in the *Lovell* case the prohibition was general within the city limits.

The Milwaukee ordinance was quite similar to that of Los Angeles. The point of interest was in its administration. The police officers adopted the policy of arresting the person distributing the printed matter only when those to whom it had been given threw the matter on the streets, thus causing an unsightly, untidy, and offensive condition of the sidewalks. The state court upheld the validity based on the administrative practice followed. The *Lovell* case was distinguished in that it obviously was not aimed at prevention of littering of the streets. The Worcester ordinance was in general similar to that of Los Angeles. The state court upheld its validity.

the press are violated.[12] A municipality may fix reasonable hours when canvassing is to be done by persons having such objects as appellant, but it may not enforce the drastic prohibitions here involved.

Mr. Justice McReynolds did not write out his dissent in the case.

The next case coming before the Court for decision was *Cantwell v. Connecticut*,[13] involving the constitutional guarantee of freedom of religion. In this case a state statute was involved which prohibited the soliciting of money for religious or charitable causes from persons other than members of the organization for whose benefit the soliciting was done, without application to a state administrative official who should determine whether the cause was a religious or charitable one or not.

Cantwell and his two sons, members of Jehovah's Witnesses, went from house to house with books and pamphlets on religious subjects and a portable phonograph with records explaining the books. On receiving permission the records were played, the books described were offered for sale, and, if not bought, funds were solicited for publishing pamphlets, with the listener donating whatever he was willing to give and in return receiving a pamphlet. None of the persons interviewed were members of Jehovah's Witnesses.

The Court, speaking through Mr. Justice Roberts, held without dissent that the conviction denied due process of law under the Fourteenth Amendment by abridging freedom to believe and freedom to act on the belief. The state may by general and non-discriminatory legislation regulate the time, the places, and the manner of soliciting funds for religious and charitable purposes, and require a stranger to establish his identity and authority to act;[14] but to require the prior approval of an administrative official with power to determine whether the cause is religious or not, when the approval embraces the exercise of judgment and the formation of opinion, is a censorship of religion as the means of determining its right to survive and denies due process.

The next case to be considered is one concerning which a great deal of interest has been manifested. It deals with the question of compulsory flag saluting. *Minersville School District v. Gobitis*[15] involved the validity

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[12]It is interesting to observe that the Court did not base its decision on freedom of religion.

[13]310 U.S. 296, 60 Sup. Ct. 900, 84 L. ed. 1213, decided May 20, 1940, apparently by a unanimous court with Justice Roberts delivering the opinion.

[14]*Cf.* Lewis Publishing Co. v Morgan, 229 U.S. 288, 306-310, 33 Sup. Ct. 867, 871, 873, 57 L. ed. 1190 (1913); People of State of New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 72, 49 Sup. Ct. 61, 64, 73 L. ed. 184 (1928).

[15]310 U.S. 586, 60 Sup. Ct. 1010, 84 L. ed. 1375, decided June 3, 1940.

of an administrative regulation of a local board of education requiring teachers and pupils to participate in a flag ceremony including a salute and a pledge of allegiance thereto—a ceremony familiar to all. The Gobitis children, age twelve and ten, were members of a family affiliated with Jehovah's Witnesses. For them the Bible was the supreme authority. The children had been brought up conscientiously to believe that saluting the flag was forbidden by scriptural command.[16] For failure to salute the flag they were expelled and the father was forced to send them to a private school, since school attendance was compulsory.

The opinion of the Court was delivered by Mr. Justice Frankfurter who had at the time a reputation for defending civil liberties; a dissenting opinion was written by Mr. Justice Stone which has been referred to as deserving a place in the classic literature of civil liberty;[17] and the case is interesting also in that it has been overruled.

The Court upheld the regulation of the board. While every possible protection should be given to the claims of religious faith, such faith does not relieve the citizen from the duty to discharge political responsibilities. A part of the political responsibility of the individual is to aid in the development and maintenance of national unity, which is the basis of national security. The flag is the symbol of both—unity and security.

The Court transferred the basis of the authority from an administrative regulation to a statutory enactment, possibly not justifiable in the premises, and stated that, should the Court stigmatize legislative judgment in providing for this gesture of respect through a salute to the flag by declaring such a determination unconstitutional, it would amount, on the part of the Court, to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no controlling competence. To exempt some of the children might introduce elements of difficulty in the school discipline, thus weakening the results sought to be accomplished.

The dissenting opinion of Mr. Justice Stone is interesting. The Justice stated that these children were citizens of the United States. Neither they nor their father had exhibited by any action or statement of opinion any disloyalty. Their religious convictions were genuine. The law sustained by the case was unique in the history of Anglo-American legislation, for

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[16]Notably the passage in the Book of Exodus, c. 20: "3. Thou shalt have no other gods before me. 4. Thou shalt not make unto thee any graven images, or any likeness of anything that is in heaven above, or that is in the earth beneath, or bow down thyself to them, nor serve them. . . ."

[17]See Cushman, *Constitutional Law in 1939-1940* (1941) 35 AM. POL. SCI. REV. 250, 271, commenting on the case under consideration. In this connection the reader will find quite interesting and valuable the annual review of constitutional decisions by Professor Cushman and published generally in the April number of the REVIEW.

it sought to coerce children to express a sentiment which they did not entertain. It was not denied that such compulsion was a prohibited infringement of personal liberty except in so far as it might be justified as a proper exercise of the state's power over public education. It was further conceded that the constitutional guarantee of personal liberty is not always absolute. The government may make war and raise armies, compelling citizens to give military service,[18] and may subject them to military training despite their religious objections.[19] It may suppress religious practices dangerous to morals.[20]

But these are far different from the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious consciences. Even if we believe that such compulsion will contribute to national unity, there are other ways to teach loyalty and patriotism, which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions. The government is not deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties. If these liberties are to have any meaning, they must be deemed to withhold from the state any authority to compel belief or expression of it where that expression violates religious convictions. Legislation which operates to repress religious freedom of small minorities must be subject to judicial scrutiny. The inconveniences which may attend some sensible adjustment of school discipline, in order that the religious convictions of these children may be spared, do not present a problem so momentous or pressing as to outweigh the freedom from compulsory violation of religious faith which has been thought worthy of constitutional protection.

Cox v. New Hampshire[21] involved the violation of a state statute prohibiting a parade or procession upon a public street without a special license. The statute set up a licensing board with delegated power to investigate and decide the question of granting licenses. Application should be in writing, specifying the day and hour; and a graduated fee was provided ranging from a nominal sum to $300.

Sixty-eight Jehovah's Witnesses with twenty other persons met at a hall, divided themselves into four or five groups, and proceeded to march through the streets in single file carrying placards advertising meetings.

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[18]Selective Draft Law Cases, 245 U.S. 366, 38 Sup. Ct. 159, 62 L. ed. 349 (1918).
[19]Hamilton v. Regents, 293 U.S. 245, 55 Sup. Ct. 197, 79 L. ed. 343 (1934).
[20]Davis v. Beason, 133 U.S. 333, 10 Sup. Ct. 299, 33 L. ed. 637 (1890).
[21]312 U.S. 569, 61 Sup. Ct. 762, 85 L. ed. 1049, decided March 31, 1941.

They did not apply for, nor did they receive, a license. On conviction the sole charge against them was that they were participating in a parade without a license. The state supreme court upheld the statute and on appeal to the Supreme Court, Chief Justice Hughes speaking for a unanimous Court affirmed the holding of the lower court. Appellants were not denied freedom of religion, or speech, or press, or assembly, the denial of all of which they alleged. Civil liberties imply the existence of organized society's maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The control of travel on the streets is a familiar illustration of a social need. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command.

Nor was the fee illegal. Such a charge was a reasonable method of meeting the additional expenses the city would have in furnishing the necessary police protection to maintain order and safety. The graduated fee was permissible since some parades or processions are much more elaborate than others.

The Court distinguished *Lovell v. Griffin*[22] by showing that the ordinance involved there prohibited the distribution of all literature at any time or place without a permit, thus subjecting the freedom of the press to license and censorship.[23] In *Schneider v. State*[24] the thing that was objected to was an ordinance which banned unlicensed communication of views subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it. In *Cantwell v. Connecticut*[25] the statute dealt with solicitation of funds for religious causes and authorized an official to determine whether the cause was a religious one, and to refuse a permit if he determined it was not, thus establishing a censorship of religion. None of these was involved in the case under consideration. Nor was there any question of peaceful picketing.[26] All that was involved was the justifiable right of the exercise of local control over the streets for parades and processions.

Chaplinsky v. New Hampshire[27] involved the use of some rather strong language by a Witness contrary to a state statute forbidding its use. Appellant here was one of the parties involved in *Cox v. New Hampshire.*

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[22]303 U.S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938), cited *supra* note 6.

[23]*Cf.* Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 Sup. Ct. 964, 83 L. ed. 1423 (1939).

[24]308 U.S. 163, 60 Sup. Ct. 146, 84 L. ed. 155 (1939).

[25]310 U.S. 305, 60 Sup. Ct. 900, 84 L. ed. 1213 (1940).

[26]*Cf.* Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. ed. 1093 (1940), and Carlson v. People of California, 310 U.S. 106, 60 Sup. Ct. 746, 84 L. ed. 1104 (1940).

[27]315 U.S. 568, 62 Sup. Ct. 766, 86 L. ed. 1031 (1942).

The facts were that Chaplinsky, a member of Jehovah's Witnesses, got into an argument with a police officer over his activities in distributing literature as a "racket." The complaint charged appellant with the use of the following words, addressed to the officer: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." The lower court held, and the Supreme Court speaking unanimously through Mr. Justice Murphy agreed, that the use of such words violated a state statute which forbade any person to address any offensive, derisive or annoying words to another person lawfully in any streets or other public place, or to call any person by such name.

The test of the use of an offensive word is what men of common intelligence would understand would be words likely to cause an average addressee to fight. Argument is unnecessary to demonstrate that the appellations "damn racketeer" and "damn Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Although the first case under the style of *Jones v. Opelika*[28] was subsequently overruled by *Murdock v. Pennsylvania,*[29] the case is interesting from several angles in addition to that of giving a complete picture of the problem surveyed in this discussion. Among those interesting angles are that it was a five-to-four decision with Chief Justice Stone writing a vigorous dissent; Justices Black, Douglas, and Murphy concurred in the dissent of the Chief Justice and while so doing pointed out that although they were in the majority in upholding the compulsory flag salute decided in *Minersville School District v. Gobitis,*[30] they now believed the *Gobitis* case was wrongly decided. This voluntary admission by those who were at the time members of the majority is apparently without precedent.

But to return to a consideration of the first *Jones* case in which Mr. Justice Reed wrote the opinion of the Court. Two similar cases were combined with it.[31] The ordinance of Opelika (Alabama) required book agents to pay $10 per annum, transient distributors of books to pay $5. The license was subject to revocation at the discretion of the city, with or without notice. The license fee in Casa Grande (Arizona) was $25 per quarter, that in Fort Smith (Arkansas) ranged from $2.50 per day to $25 per month. None of the ordinances discriminated against the sale of

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[28]316 U.S. 584, 62 Sup. Ct. 1231, 86 L. ed. 1691, decided June 8, 1942.
[29]319 U.S. 105, 63 Sup. Ct. 891, 87 L. ed. 1292, decided May 3, 1943.
[30]For a discussion of this case, see *supra* note 15 and accompanying text.
[31]Bowden v. Fort Smith, Ark., and Jobin v. Casa Grande, Ariz.

religious literature, nor did it appear they were drafted with such discrimination in mind. They were non-discriminatory license taxes on the sale of printed matter. In disposing of the Opelika (Alabama) ordinance and upholding its validity, the Court pointed out that the sole constitutional question involved was whether a non-discriminatory license fee, presumably appropriate in amount, may be imposed on appellant, he being a Jehovah's Witness who refused to pay the fees required.

It was because the Court viewed these sales as partaking more of commercial than religious or educational transactions that it held the ordinance valid. None of the three ordinances attempted to censor the literature sold or to regulate in any way the activities of the sellers.

The dissenting opinions should be stressed because, as noted above, they became the law. Chief Justice Stone pointed out in his dissent that the ordinance in the *Opelika* case should be held invalid on two grounds. One was that the annual tax is an unconstitutional restriction of the freedoms guaranteed in the First Amendment, which the Fourteenth made applicable to the states. The other was that the requirement of a license for dissemination of ideas, which license is revocable at will without cause and in the unrestrained discretion of administrative officers, is likewise an unconstitutional restraint on such freedoms. This is much more of a callous disregard of constitutional rights than that exhibited in *Lovell v. Griffin,* for in the latter case, at least the defendant might have been given a license if he had applied for it. Here the defendant Jones was prohibited from disttributing his pamphlets at all unless he paid in advance a year's tax with the provision that the license could be revoked without cause, notice, or hearing, at the will of the city officials.

There was not the slightest pretext that the "fee" was to defray administrative expenses. None of the ordinances purported to control the time, place, or manner of the distribution of the books or pamphlets concerned. None had any discernible relationship to the police protection or the good order of the community. These ordinances levied taxes on the dissemination of religious literature; and the constitutional protection was not evaded by classifying with business callings an activity whose sole purpose was the dissemination of ideas, and taxing it as business callings are taxed. It seems fairly obvious that if the present taxes, laid in small communities upon peripatetic religious propagandists, were to be sustained, a way had been found for the effective suppression of speech and press and religion despite constitutional guarantees.

Mr. Justice Murphy wrote a separate dissenting opinion in which the Chief Justice, and Mr. Justices Black and Douglas concurred. He

pointed out that ordinances that may operate to restrict the circulation or dissemination of ideas on religious or other subjects should be framed with fastidious care and precise language to avoid undue encroachment on these fundamental liberties. All the petitioners were ministers of Jehovah's Witnesses and it did not appear that their motives were commercial, but only that they were evangelizing their faith as they saw it. There was no suggestion in any of the three cases that petitioners were perpetrating a fraud, that their activities created any public disturbance, that private rights were contravened, or that the literature distributed was offensive to morals or created any "clear and present danger" to organized society.

An arresting parallel exists between the unpopularity of Jehovah's Witnesses and their troubles and the struggle of various dissident groups in the American colonies for religious liberty which culminated in the Virginia Statute for Religious Freedom.[32] If the Court was to err, it was far better that it err in being overprotective of the rights involved in these cases.

While no new constitutional point was involved which the Court had not previously passed on, the next two cases are of interest to give a complete survey.

Largent v. Texas[33] involved the validity of an ordinance of Paris (Texas) which made it unlawful for any person to solicit orders or sell books within the residence portion of the city without first filing an application and obtaining a permit. Discretion was left to the mayor to give the permit. Mr. Justice Reed in delivering the opinion of the Court pointed out that this case was governed by the recent decisions of the Court.[34] The ordinance involved an administrative censorship in an extreme form. It abridged freedom of religion, press and speech.[35]

Jamison v. Texas[36] involved the validity of an ordinance of the City of Dallas which made it unlawful for any person among other things, "to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk." Appellant was convicted of violation of the ordinance. She was distributing handbills in an orderly manner to pedestrians whom she met on the street.

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[32]Adopted in 1785 through the efforts of Jefferson and Madison, VA. CODE ANN. (1930) § 34.

[33]318 U.S. 418, 63 Sup. Ct. 667, 87 L. ed. 873, decided March 8, 1943.

[34]See Lovell v. Griffin, 303 U.S. 444, 58 Sup. Ct. 666, 82 L. ed. 949 (1938); Schneider v. State, 308 U.S. 147, 60 Sup. Ct. 146, 84 L. ed. 155 (1939); Cantwell v. Connecticut, 310 U.S. 296, 60 Sup. Ct. 900, 84 L. ed. 1213 (1940).

[35]See also Chaplinsky v. New Hampshire, cited *supra* note 27. See accompanying text for discussion.

[36]318 U.S. 413, 63 Sup. Ct. 669, 87 L. ed. 869, decided March 8, 1943.

On one side of the handbill was an invitation to attend a meeting of Jehovah's Witnesses in one of the city parks. On the other side the invitation was repeated with the description of two books which would be mailed "Postage prepaid on your contribution of 25¢."

Mr. Justice Black delivered the opinion of the Court invalidating the ordinance. While the state can prohibit the use of the street for the distribution of purely commercial leaflets,[37] it may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.

Murdock v. Pennsylvania[38] involved the re-examination of the constitutional issue passed on in *Jones v. Opelika,* which was the validity of a municipal ordinance levying a non-discriminatory license fee for revenue on the sale of religious books and tracts. Reversal of the *Opelika* case was anticipated in view of the fact that Mr. Justice Byrnes who voted with the majority in the *Opelika* case had been succeeded by Mr. Justice Rutledge, who had dissented rather vigorously while a member of the Circuit Court of Appeals for the District of Columbia on a similar, but less burdensome, license tax.[39] When the case came up for hearing Mr. Justice Rutledge did join the four dissenting judges in the *Opelika* case for a five-to-four decision in *Murdock v. Pennsylvania,* with Mr. Justice Douglas delivering the opinion of the Court. The four Justices who dissented, Frankfurter, Jackson, Reed, and Roberts, did so in three opinions by Frankfurter, Jackson, and Reed.[40]

The *Murdock* case involved a forty-year-old ordinance of the City of Jeanette, Pennsylvania. It imposed a non-discriminatory and somewhat substantial tax for revenue on all persons canvassing for or soliciting orders for merchandise of any kind. The tax varied from $1.50 for one day to

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[37]Valentine v. Chrestensen, 316 U.S. 52, 55, 62 Sup. Ct. 920, 922, 86 L. ed. 1262, 1266 (1942).

[38]319 U.S. 105, 63 Sup. Ct. 870, 87 L. ed. 1292, decided May 3, 1943, eleven months after *Jones v. Opelika.*

[39]See Busey v. District of Columbia, 129 F.(2d) 24 (App. D. C. 1942). This decision was rendered April 15, 1942, and reversed by the Supreme Court on June 14, 1943, because of the decisions in the *Murdock* and second *Opelika* cases. See 319 U.S. 579, 63 Sup. Ct. 1277, 87 L. ed. 1598.

[40]A rehearing of Jones v. Opelika, 316 U.S. 584, 62 Sup. Ct. 1231, 86 L. ed. 1691 (1942), had been granted, along with its companion cases, *Bowden v. Fort Smith* and *Jobin v. Arizona;* and these cases were disposed of the same day as the *Murdock* case. In all three the judgments of the court were vacated, and the judgments of the lower courts reversed. The dissenting opinions of Mr. Justice Reed and Mr. Justice Frankfurter in Jones v. Opelika, 319 U.S. 103, 63 Sup. Ct. 890, 87 L. ed. 1290 (1943), found at 319 U.S. 105, 63 Sup. Ct. 891, 87 L. ed. 1301, cover the *Murdock* case. For the dissenting opinion of Mr. Justice Jackson, see 319 U.S. 157, 63 Sup. Ct. 882, 87 L. ed. 1330 (1943).

$20 for three weeks. Murdock and others, members of Jehovah's Witnesses, went from door to door distributing literature and soliciting people to buy religious books and pamphlets at twenty-five cents for the books and five cents for the pamphlets. Lesser sums were accepted as donations and sometimes the literature was given away. No license was obtained and, for failure to obtain it, the solicitors were convicted and fined for violation of the ordinance.

The Court held the ordinance invalid. Distribution by hand of religious tracts is an age-old form of missionary evangelism. It has the same claim to protection as the more orthodox and conventional exercises of religion. The case presents a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities. In answer to the point made in *Jones v. Opelika*[41] that when a religious sect uses "ordinary commercial methods of sales of articles to raise propaganda funds" it is a proper exaction for the state to charge "reasonable fees for the privilege of canvassing," the Court pointed out that situations will arise when it will be difficult to determine whether a particular activity is religious or purely commercial.

The mere fact, however, that the religious literature is sold rather than donated does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church a commercial enterprise. The power to impose this tax is as potent as the power of censorship. This is not a registration system for identification purposes; it is not a nominal fee to defray administrative expenses. On its face the ordinance was a restriction on the free exercise of the freedoms protected by the First Amendment.

These witnesses were pursuing their solicitations peacefully and quietly. They were not charged with the use of abusive language;[42] nor was this a state regulation of the streets to insure safety;[43] nor was the ordinance narrowly drawn to safeguard the people of the community in their homes against the evils of solicitation.[44]

Mr. Justice Reed, in dissenting, in which dissent as previously indicated, Mr. Justices Roberts, Frankfurter, and Jackson joined, reaffirmed the position of the Court taken in the first *Jones v. Opelika* case. He

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[41]316 U.S. 584, 62 Sup. Ct. 1231, 86 L. ed. 1691 (1942).

[42]*Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 62 Sup. Ct. 766, 86 L. ed. 1031 (1942).

[43]*Cf.* Cox v. New Hampshire, 312 U.S. 569, 61 Sup. Ct. 762, 85 L. ed. 1077 (1941).

[44]*Cf.* Cantwell v. Connecticut, 310 U.S. 296, 60 Sup. Ct. 900, 84 L. ed. 1213 (1940).

further emphasized the point that the methods used by the Watch Tower Bible and Tract Society in its distribution and sale of literature justified the characterization of the transaction as a commercial undertaking. Whatever exemptions exist from taxation arise from the prevailing law of the various states. The national government grants exemptions to ministers and churches because it wishes to do so, not because the Constitution compels it. In such a case as this the evangelist became a book agent and as such should not be exempt from the tax.

Mr. Justice Frankfurter, in addition to concurring in what was said by Mr. Justice Reed, added a separate statement. What the petitioners insisted on was absolute immunty from any kind of monetary exaction for their occupation. That was the only ground upon which these ordinances had been attacked. Since no claim had been made that the tax was oppressive, it was gratuitous to consider its merits.

Nor could a tax be invalidated merely because it fell upon activities which constituted an exercise of a constitutional right. The press is not free from taxation although the First Amendment affords protection in the exercise of such a freedom. While those who possess the power to tax might wield it in tyrannical fashion, it does not follow, however, that every exercise of the power is an act of tyranny, or that government should be impotent because it might become tyrannical.

The real issue here was not whether a city may charge for dissemination of ideas, but whether the states have the power to require those who need additional facilities to help bear the cost of furnishing such facilities. As the facts in the case showed, such additional governmental facilities have to be supplied, and they involve outlays which have to be met. There is nothing in the Constitution which exempts persons engaged in religious activities from sharing equally in the costs of benefits to all, including themselves, provided by government.

Before the decision in the *Murdock* case was rendered, involving the ordinance of the City of Jeannette, one Douglas brought suit in equity in the federal district court to restrain the enforcement of the ordinance. It was brought to the United States Supreme Court on a writ of certiorari under the style of *Douglas v. City of Jeannette*.[45] The Court speaking through Mr. Chief Justice Stone refused to enjoin the city, on the ground that the defendants' rights could and should be tested in criminal proceedings in the state court; and then if necessary, an appeal could be taken to the Supreme Court.

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[45]319 U.S. 157, 63 Sup. Ct. 877, 87 L. ed. 1324, decided May 3, 1943.

We now turn to a consideration of *Martin v. City of Struthers*,[46] which was the third case involving Jehovah's Witnesses decided on the same day.[47] The decision in the first *Jones* case, and its companion cases, was vacated also on the same day, in a *per-curiam* decision. The point raised in the case presently being considered was the legality of a city ordinance forbidding persons distributing handbills, circulars, or other advertising matter to ring doorbells or otherwise summon residents to the door to receive such matter. Appellant was convicted and fined for violation of the ordinance in distributing leaflets advertising a religious meeting. The constitutional issue involved freedom of speech and of the press. The Court held the ordinance invalid. Mr. Justice Black delivered the opinion, with Mr. Justices Murphy and Frankfurter writing separate opinions. Mr. Justices Roberts, Reed and Jackson dissented. They wrote separate dissents, that written by Mr. Justice Jackson being rather lengthy.

The Court pointed out that it has been a common practice for centuries to permit persons not specifically invited, to knock on doors or ring bells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household.[48] Freedom of speech and the press embrace the right to distribute literature[49] and necessarily protect the right to receive it. Nor may the privilege be withdrawn even if it creates the minor nuisance of cleaning litter from the streets.[50]

While the peace, good order, and comfort of the community may imperatively require regulation of the time, place, and manner of distribution,[51] the ordinance here did not control anything but the distribution of literature. A city, through general trespass ordinances, can punish those who call at a home in defiance of the previously expressed will of the occupant, and, in addition, can control the evil of criminals posing as canvassers;[52] but due respect for the constitutional right of those who desire to distribute and receive literature must be observed.

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[46]319 U.S. 141, 63 Sup. Ct. 862, 87 L. ed. 1313 (1943).

[47]Murdock v. Pennsylvania, 319 U.S. 105, 63 Sup. Ct. 870, 87 L. ed. 1292 (1943); Douglas v. City of Jeannette, 319 U.S. 157, 63 Sup. Ct. 877, 87 L. ed. 1324 (1943) and Martin v. Struthers, 319 U.S. 141, 63 Sup. Ct. 862, 87 L. ed. 1313 (1943).

[48]This ordinance was not directed solely at commercial advertising. *Cf.* Valentine v. Chrestensen, 316 U.S. 52, 62 Sup. Ct. 920, 86 L. ed. 1262 (1942).

[49]Lovell v. Griffin, 303 U.S. 444, 452, 58 Sup. Ct. 666, 669, 82 L. ed. 942 (1938).

[50]Schneider v. State, 308 U.S. 147, 162, 60 Sup. Ct. 146, 151, 84 L. ed. 155 (1939).

[51]Cantwell v. Connecticut, 310 U.S. 296, 304, 60 Sup. Ct. 900, 903, 84 L. ed. 1213 (1940).

[52]Cantwell v. Connecticut, 310 U.S. 296, 306, 60 Sup. Ct. 900, 904, 84 L. ed. 1213 (1940).

Mr. Justice Murphy in concurring pointed out that repression has no place in this country; for if there is repression, truth and reason are stifled and false prophets flourish. Prohibition may be more convenient than regulation; the Constitution will not allow the former, but it does permit a reasonable exercise of the latter.

Although Mr. Justice Frankfurter is not listed with the dissenters here, an analysis of his statement makes it difficult to say that he agreed with the majority view. The decision, he stated, left untouched "what are in my view controlling constitutional principles." However, the Justice does not elaborate on these principles.

The gist of the dissenting opinion of Mr. Justice Reed is that the ordinance was a trivial town police regulation which suppressed no ideas nor censured anything. The city council should be the one to determine whether or not this matter was a nuisance, and this ordinance seemed to be a fair adjustment of the privilege of distributors and the rights of householders.

Mr. Justice Jackson's dissent has been referred to. He used approximately 5,000 words to describe quite graphically what he regarded as pernicious activities in which Jehovah's Witnesses are engaged. They came to the city by the scores and made themselves a general nuisance to the inhabitants, a great number of whom were Catholics. The Witnesses called religion a snare and a racket and specified the Catholic religion. More complaints were filed with police headquarters than could be handled. Such were the activities which it was claimed no public authority could either regulate or tax. The Court's decisions were at odds with the realities of life.

The controlling opinion of Mr. Justice Black is unsatisfactory for three reasons. First, it does not aid the communities in determining just how to draw ordinances that are narrow enough; second, no clear-cut consideration is given to the particular activities entitled to constitutional immunity; and third, while the opinion suggests that there are evils in this conduct that a municipality may do something about, the Court does not identify them or lay down any workable guide in so doing.

As has previously been mentioned, three of the justices who voted to uphold the validity of the compulsory flag salute administrative rule in the *Gobitis* case indicated later they felt the case had been wrongly decided. This admission on their part coupled with the appointment of Mr. Justice Rutledge to the bench lead to the anticipation of the overruling of the

Gobitis case. This occurred in *West Virginia State Board of Education v. Barnette*.[53]

Mr. Justice Jackson delivered the opinion of the Court. Justices Black and Douglas concurred in a joint statement, with Mr. Justice Murphy concurring in a separate opinion. Three Justices, Frankfurter, Roberts and Reed, dissented, Frankfurter speaking for the three.

Following the decision in the *Gobitis* case, the West Virginia legislature required all schools to teach courses emphasizing Americanism. Relying on this statute, the appellant board, with the advice of the State Superintendent, ordered that the salute to the flag become a regular part of school activities. Failure to do so was insubordination with the penalty of expulsion. Readmission was denied by the statute until compliance. Meanwhile the child was unlawfully absent and might be proceeded against as a delinquent. His parents or guardians were liable to prosecution and if convicted were subject to a fine not exceeding $50 and a jail term not exceeding thirty days. Appellants sought and were granted an injunction in the federal district court.[54]

In this case the court pointed out that it was dealing with a compulsion of students to declare a belief. The issue was whether the slow and easily-neglected[55] route to arouse loyalties constitutionally may be short-cut. There is no doubt that, in connection with the pledge to the flag, the salute is a form of utterance. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. This may and quite often involves a censorship or suppression of expression of opinion which the Constitution tolerates only when the expression of opinion "presents a clear and present danger," which refusal to salute the flag apparently does not create.[56]

Nor did the issue turn altogether on the matter of religious convictions. Many citizens who do not share the religious views of Jehovah's Witnesses

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[53]319 U.S. 624, 63 Sup. Ct. 1178, 87 L. ed. 1628, decided June 14, 1943.

[54]*Cf.* Douglas v. Jeannette, 319 U.S. 157, 63 Sup. Ct. 877, 87 L. ed. 1324, cited *supra* note 45, involving a petition for injunction.

[55]See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 631, 63 Sup. Ct. 1178, 1182, 87 L. ed. 1628, 1634 (1943), n. 11, with reference to the nation-wide survey of the study of American history conducted by the *New York Times*.

[56]The question is raised as to whether or not the "bad tendency" test applied in Gitlow v. New York, 268 U.S. 652, 45 Sup. Ct. 625, 68 L. ed. 1138 (1925), and cases subsequent thereto, could not have been applied in the flag salute case rather than the doctrine of "clear and present danger."

believe that such a compulsory rite infringes the constitutional liberty of the individual.[57]

The points raised and determined in the *Gobitis* case were analyzed and disregarded. It is not a matter of the strength or weakness of the government.[58] To enforce the Bill of Rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity, for which history indicates a disappointing and disastrous end. Nor do the educational officers of the states have such a peculiar authority which, if interfered with by the Court, would in effect make the Court a school board for the country.[59] None who act under color of law are beyond reach of the Constitution.

One of the weaknesses in the *Gobitis* decision was the statement of the Court that in the field of education, the courts possess no marked and certainly no controlling competence and hence this matter should be left to legislative determination supported by public opinion.[60] The purpose of the Bill of Rights was to withdraw freedom of speech, press, and religion from the vicissitudes of political controversy. The Court must act in these matters not by authority of its competence, but by the force of its commission. Finally, and this is the very heart of the *Gobitis* opinion, the Court reasoned that national unity is the basis of national security; that the authorities have the right to select appropriate means for its attainment; and hence compulsory flag saluting is constitutional.[61]

The answer to this is that while all agree national unity is desirable and may be promoted by persuasion and example. history teaches the ultimate futility of such attempts to compel coherence. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves the unanimity of the graveyard.

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[57]Here the Court footnotes with approval the opinion expressed by Professor Cushman in his article, *Constitutional Law in 1939-40* (1941) 35 AM. POL. SCI. REV. 250, 271, where he makes the following observation with reference to the decision in the *Gobitis* case: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." See West Virginia State Board of Education v. Barnette, 319 U.S. 624, 635, 63 Sup. Ct. 1178, 1184, 87 L. ed. 1628, 1636 (1943), n. 15, in which this statement occurs; and in the same footnote the Court cites a number of further criticisms of the *Gobitis* case.

[58]*Cf.* Minersville School District v. Gobitis, 310 U.S. 586, 596, 60 Sup. Ct. 1010, 1013, 84 L. ed. 1375, 1380 (1940).

[59]*Id.* at 598, 60 Sup. Ct. at 1015, 84 L. ed. at 1381.

[60]*Id.* at 597, 598, 600, 60 Sup. Ct. at 1014, 1016, 84 L. ed. at 1381, 1382.

[61]*Id.* at 595, 60 Sup. Ct. at 1013, 84 L. ed. at 1375.

Justices Black and Douglas in their concurring opinion made it plain that the factor governing their decision in the *Gobitis* case was their reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to public welfare. The principle is sound, but its application was wrong. Neither in peace nor war should children be compelled to participate in a ceremony which ends in nothing for them but fear of spiritual condemnation.

Mr. Justice Murphy in his concurring opinion added the point that the real issue was the right of freedom to believe and freedom to worship according to the dictates of one's conscience. The Constitution specifically guarantees this freedom. While some good may be derived from such regulations as requiring compulsory flag saluting, it is not sufficiently definite and tangible to justify the invasion of the freedom of the individual.

Mr. Justice Frankfurter's dissenting opinion may be summarized briefly: First, one's own opinions about the wisdom or evil of a law should be wholly disregarded, except as that opinion may lead a member of the Court to say whether legislators could in reason have enacted such a law. Second, the power of the Court does not vary according to the particular provision of the Bill of Rights. The protections against the taking of private property without just compensation and unreasonable searches and seizures have just as much dignity before the Court as have the freedoms of speech, press, and religion. Third, a compulsory flag salute is not the first instance of exacting obedience to general laws that have offended deep religious scruples. Examples are compulsory vaccination, feed inspection regulations, obligations to bear arms, testimonial duties, and compulsory medical treatment. Fourth, the "clear and present danger" doctrine is not applicable to this type of legislation, since Mr. Justice Holmes used the phrase in a case involving mere speech as a means by which alone to accomplish sedition in time of war. Finally, it is true that patriotism cannot be enforced by the flag salute; but neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Reliance rather must be had on the faith of a free society translated into the mores of the community.

Mississippi's anti-sedition statute[62] was upheld by the state Supreme Court by a tie vote[63] in *Taylor v. Mississippi*.[64] The decision in this case controlled the decision in the other two Witnesses cases disposed of the

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[62]H.B. No. 689, Miss. Laws 1942, c. 178, approved March 20, 1942: MISS. CODE ANN. (1942) §§ 2402-2405. The final vote on passage was as follows: House, 125 for, none against, 15 absent and not voting; Senate, 47 for, none against, 2 absent and not voting. There are 140 members of the House and 49 members of the Senate.

[63]There are six members on the Supreme Court bench and thus by a vote of three to three, the holding of the lower court was affirmed.

[64]194 Miss. 1, 11 So.(2d) 663, decided Jan. 25, 1943.

same day.[65] Judge Roberds delivered the opinion of the court with Judges Griffith and McGehee concurring. Judge Alexander delivered a dissenting opinion in which Judge Anderson and Chief Justice Smith concurred. In addition Judge Anderson delivered a dissenting opinion and the Chief Justice wrote a dissent in which Judges Alexander and Anderson concurred. This was the division of the court in the other two cases.

The appellant contended that the statute was unconstitutional as applied to him because it deprived him of the right of free speech and free press guaranteed by the Constitution of Mississippi and the United States.[66] He also contended it deprived him of freedom of worship.[67] The facts as summarized by the court showed the usual procedure of Jehovah's Witnesses in visiting homes, criticizing the government in sending men to fight, stating it was wrong to salute the flag, and selling pamphlet extracts which as reported, bore out the statements of the Witnesses. Two of the homes visited had lost sons in the attack upon Pearl Harbor.

The question, the court stated, should be tested by the power of a state in wartime, for the statute was an emergency, temporary war act. As to the question of the flag, the court cited a number of cases in other states in which statutes had been upheld forbidding the display of certain kinds or colors of flags designed to promote disloyalty, as well as a number of cases upholding compulsory flag salute, including the *Gobitis* case.[68]

The court disposed of the religious question involved by saying that the flag salute and pledge of allegiance in question did not in any just sense relate to religion. It is a fallacy of the rankest kind to assume that loyalty to one's country and its flag was attributing to them any aspect of divinity or omnipotent power. Further, in answer to the point that the facts as disclosed did not prove the existence of a clear and present danger, the statute did not require such proof; but even if it did, the proof was sufficient. The utterances, oral and written together, were certainly calculated to create disloyalty and reasonably tended to create an attitude of stubborn refusal to salute the flag. Thus there was a sufficiently ascertainable standard on which a jury could reasonably render a verdict.

Judge Alexander in his excellent dissenting opinion argued that there was greater danger to free speech from the controlling opinion than there was to the war effort by appellant's actions. The Court must be anxious

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[65]Cummings v. State, 194 Miss. 59, 11 So.(2d) 683, and Benoit v. State, 194 Miss. 74, 11 So. (2d) 689 (1943).

[66]Miss. Const. 1890, § 13, U.S. Const. Amend. 1.

[67]Miss. Const. 1890, § 18, U.S. Const. Amend. 1.

[68]The Mississippi Court could not have known that the *Gobitis* case would be overruled on the same day its decision in the *Taylor* case was struck down.

not only for a fancied future effect of the utterances but for the present effect of the suppression of fundamental rights. The Court must view with complacency a conflict of mere notions involving both wisdom and folly, since both are conceded by the Constitution. That opinions weaken our war effort is no test of their legal culpability unless there is coupled with such opinions the advocacy of disobedience to existing law or the violent overthrow of our government.[69] There is neither logic nor law to support the view that these liberties must be surrendered in order to be saved. Liberty cannot be rationed, nor is it expendable. Law cannot compel loyalty, for the expressions of mere opinion even though beneath contempt are nevertheless above the law. Since it is not the safety of the people but the safety of their liberties which is the supreme goal, it is only the traitor who purchases life at the cost of a people's liberty.

The *Taylor* case and its companion cases were consolidated and overruled by the United States Supreme Court in *Taylor v. Misssisippi,*[70] thus invalidating the statute involved. There was no dissent from the controlling opinion delivered by Mr. Justice Roberts. The convictions in the state court and the reversal by the Supreme Court were based on the first section of the law which, as analyzed by the Court, defined six offenses.[71] Only two of the six offenses were involved in the three indictments on which appellants were convicted. Taylor and Cummings, one of the other two Witnesses appealing, were indicted for (1) teaching and dissemination of printed matter designed and calculated to encourage disloyalty to the national and state governments, and (2) distribution of printed matter reasonably tending to create an attitude of stubborn refusal to honor or respect the flag or government of the United States or of the State of Mississippi. Benoit was indicted for the dissemination of literature reasonably tending to create the denounced attitude towards the flag and government.[72]

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[69]This point is developed more fully in Judge Alexander's dissent in Cummings v. State, 194 Miss. 59, 11 So.(2d) 683 (1943).

[70]319 U.S. 583, 63 Sup. Ct. 1200, 87 L. ed. 1600, decided June 14, 1943.

[71]These are (1) teaching and dissemination of printed matter designed and calculated to encourage disloyalty to the national and state governments; (2) distribution of printed matter reasonably tending to create an attitude of stubborn refusal to honor or respect the flag or government of the United States or of the State of Mississippi; (3) preaching, teaching, dissemination of teachings, or distribution of written or printed matter designed or calculated to encourage violence or sabotage; (4) advocacy, by action or speech, of the cause of the enemies of the United States; (5) the giving of information as to military affairs; and (6) incitement of racial disturbances, disorder, prejudice or hatred.

[72]See Taylor v. Mississippi, 319 U.S. 588, 63 Sup. Ct. 1200, 1203, 87 L. ed. 1600, 1606 (1943).

The Court relied on the *Barnette* case,[73] the decision of which was handed down on the same day, to reverse the decisions of the Mississippi Supreme Court. If the Fourteenth Amendment bans enforcement of a school regulation requiring a salute to the flag, *a fortiori* it prohibits the imposition of punishment by statute for urging and advising that, on religious grounds, citizens refrain from saluting the flag. To convict one for doing this denies freedom of speech and freedom of press guaranteed by the Fourteenth Amendment. What appellants communicated is not claimed or shown to have been done with an evil purpose, to have advocated or incited subversive action against the nation or state,[74] or have threatened any clear and present danger to our institutions or our government.[75] What these appellants communicated were their beliefs and opinions[76] concerning domestic measures and trends in national and world affairs. Criminal sanctions cannot be imposed for such communications.

Prince v. Massachusetts[77] involved the constitutionality of a state child labor law. Massachusetts has a comprehensive law providing among other things, that no boy under 12 nor girl under 18 shall sell magazines on the streets or other public place. Penalties are imposed on whoever furnishes the articles and on the parent or guardian compelling or permitting such sales. Appellant, the guardian of a girl under the specified age, allowed the girl at the request of the latter to accompany her on the streets to pursue the activities of the Witnesses. Both claimed to be ordained ministers and both believed it was their religious duty to do what they were doing.

Appellant based her case on two points. First, the statute was unconstitutional in depriving her of freedom of religion; and second, it denied her the parental right as guaranteed by the due process clause of the Fourteenth Amendment. The decision was 5-4 with Mr. Justice Rutledge delivering the opinion of the Court. Jackson, Roberts, Frankfurter, and Murphy dissented.

The Court pointed out that the care of a child resides first in the parents but the family is not beyond regulation in the public interest as against a claim of religious liberty. The right to practice religion does not include the liberty to expose the child to the hazards of disease or ill health.

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[73]319 U.S. 624, 63 Sup. Ct. 1178, 87 L. ed. 1628 (1943).

[74]See Schenck v. United States, 249 U.S. 47, 39 Sup. Ct. 247, 63 L. ed. 470 (1919); Abrams v. United States, 250 U.S. 616, 40 Sup. Ct. 17, 63 L. ed. 1173 (1919); Whitney v. California, 274 U.S. 357, 47 Sup. Ct. 641, 71 L. ed. 1095 (1927).

[75]See De Jonge v. Oregon, 299 U.S. 353, 57 Sup. Ct. 255, 81 L. ed. 278 (1937); Herndon v. Lowry, 301 U.S. 242, 57 Sup. Ct. 732, 81 L. ed. 1066 (1937).

[76]See Stromberg v. California, 283 U.S. 359, 51 Sup. Ct. 532, 75 L. ed. 1117 (1931); Thornhill v. Alabama, 310 U.S. 88, 60 Sup. Ct. 736, 84 L. ed. 1093 (1940).

[77]321 U.S. 158, 64 Sup. Ct. 784, 88 L. ed. 645 (1944).

Concededly, a statute of such nature applicable to adults would be invalid; but the state's authority over children's activities is broader than over like action of adults. Street preaching, with the attendant selling of the magazines, subjects a child of tender age to situations wholly inappropriate. Although no clear and present danger may exist, other harmful possibilities could be stated, such as emotional excitement and psychological or physical injury. The Court concluded that religious training and indoctrination of children may be accomplished in many ways, but public proclaiming of religion on the streets by minors may be prohibited.

Jackson in his dissent chides the Court for holding in the *Murdock* case that the religious activities of the Witnesses have the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits, and yet child labor laws are applied to the former but not the latter. Murphy emphasizes the unreasonableness of the law as applied to Jehovah's Witnesses. He points out that this group is living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure.[78]

The Court disposed of *Follet v. Town of McCormick, S. C.*,[79] on the general bases of the decisions in *Jones v. Opelika*[80] and *Murdock v. Pennsylvania*.[81] The ordinances in all material respects, so the Court stated, were the same. All involved the levying of a flat license tax on agents selling books. The present ordinance levied a fee of $1 per day or $15 per year. It should be pointed out, however, that in the previous cases the tax on itinerant preachers was invalidated but here it was invalidated as levied against a resident preacher, a Witness, who obtained his living in this way. He had no other source of income. The dissenting Justices, Roberts, Frankfurter, and Jackson, thought this made a difference, and that the license fee should be upheld. Again, it is interesting to note that in the *Murdock* case, the Court pointed out that the distinction between "religious activity" and "purely commercial" activity would at times be vital in determining the constitutionality of flat license taxes such as these applied to Witnesses. This case, too, apparently eliminates the constitutionality of a small fee for administrative expenses, a point left undecided in the *Opelika* case, and assumed, by implication, as being valid, in the *Murdock* case.

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[78]Mulder and Comisky, *Jehovah's Witnesses Mold Constitutional Law*, 2 Bill of Rights Rev. 262.

[79]321 U.S. 573, 64 Sup. Ct. 717, 88 L. ed. 938 (1944).

[80]319 U.S. 103, 63 Sup. Ct. 890, 87 L. ed. 1290 (1942), cited *supra* note 28.

[81]319 U.S. 105, 63 Sup. Ct. 870, 891, 87 L. ed. 1292 (1943), cited *supra* note 29.

Summary

This survey has covered a direct consideration of twenty-three cases before the United States Supreme Court involving Jehovah's Witnesses. Of these twenty-three, however, consolidation made in three instances has given a net total of sixteen cases. These sixteen cases involved nine municipal ordinances, five state statutes, and two regulations of state boards of education. Four of the cases involved the validity of distributing literature without a permit, and in each case, the Court held the permit was not necessary nor could it be exacted. Four of the cases involved the levying of a license tax on the sale of books and pamphlets. The Court upheld a municipal ordinance levying such a license tax in the first case; but in a later case, the Court reversed itself. Apparently an imposition nominal in amount for administrative purposes is forbidden.

Two cases involved compulsory flag salute regulations by two different boards of education. In the first case, the Court upheld the validity of the regulation; but in the second case, it vacated its original judgment and held invalid such a requirement. One case involved the validity of a statute requiring a permit to solicit money, the statute being declared void. One state statute was upheld prohibiting the use of offensive language in public. Another statute requiring a license fee for expenses incurred in supervising a parade was upheld. A municipal ordinance prohibiting the ringing of doorbells in connection with the activities of the Witnesses was struck down. Finally one statute involving disloyalty and the flag salute problem was held invalid.

In the sixteen cases freedom of the press alone was involved in one; freedom of religion alone was involved in four; freedom of speech only was involved in one; freedom of speech and press were the basis of the decision in three; freedom of speech, and religion determined one; all three, speech, press, and religion, were the bases of the Court's determination of the matter in five of them; and finally these three freedoms plus freedom of assembly were the basis of the decision in another one. It is interesting to note that, since the Jehovah's Witnesses are a religious group, violation of freedom of religion found expression only in the municipal ordinance preventing solicitation of money without a permit; and in the regulation of the board of education requiring a child, against his religious teachings, to salute the flag.

From the standpoint of territorial distribution, the sixteen cases came up from ten different states, Pennsylvania leading with three. New Hampshire and Texas had two each, and there was one case each from Alabama, Connecticut, Georgia, Massachusetts, Mississippi, New Jersey, Ohio, South Carolina, and West Virginia.

Professor Cushman in the April, 1944, issue of *The American Political Science Review* argues that these decisions leave the state and city powerless to tax or to regulate the activities of the Jehovah's Witnesses. A review of the decisions in these cases leads the writer to a different conclusion. While a tax for revenue may not be levied on the activities of the Witnesses, a tax in the form of a license fee to meet the expenses incurred by policing a parade may be levied. While freedom of speech may not be denied the Witnesses, they can be prevented from using abusive language. While prohibition may not be applied to visiting from house to house, reasonable hours may be fixed. Although they have the right to distribute literature, the time, place, and manner of such distribution may be regulated. Further, general trespass-after-warning statutes exist in most states.

What the decisions really amount to is that although no rights are absolute, the freedoms of speech, press, and religion are fundamental; and they should be protected with as little curtailment as possible.

TAX TITLES IN MISSISSIPPI

*Lester Clark**

The ad valorem tax upon real estate has long been a principal source of revenue to the states and to the local governmental units within them. Severe economic depression has strained this tax almost to the breaking point. On the one hand, delinquencies have mounted in many communities to so high a proportion of the tax levy as to jeopardize the payment of governmental obligations and the maintenance of essential services which have been dependent upon this tax. On the other hand, accentuation of the tax burden by the depression has led to the organization of important pressure groups working for a variety of measures which may be subsumed under the slogan "relief for real estate."

In this complex of interrelated problems, tax collection procedure may seem of limited significance. Admittedly it is not basic. Yet evidence is not lacking that a considerable share of blame for the fact that so many lands are allowed to sell for taxes is the laxity of the system for the collection of the real property tax. However, the Mississippi Legislature for many years, even long before the Civil War, has been attempting to pass legislation that would give tax titles a higher degree of integrity so that these titles would be readily acceptable by title attorneys and title insurance companies of our state.

Until a more equitable basis, or apportionment of tax, is evolved, it is essential that the procedure under our present system be revised to facilitate the collection of delinquent taxes and to reduce to a minimum anticipated borrowing, and to assure the purchaser of property sold for taxes of a valid and marketable title. So long as we accept the premise that owners of real estate must pay the major portion of the cost of the government and if we assume that property is properly assessed, we cannot shirk from the probability that some of such owners may object if an effort is made to collect the taxes so assessed. It is unfortunate, but inevitable, that the government must of necessity bear down on the individual taxpayer in time of depression and enforce more strictly the collection of taxes, the payment of which, through laxity, rather than leniency, it permitted him to neglect in time of so-called prosperity. Objection to strenuous adherence to a mandatory procedure as to the collection of taxes will dwindle when taxpayers who pay their taxes promptly come to the realization that otherwise their tax rates necessarily have to be increased to pay for the delinquencies of others. This problem of tax delinquencies is not limited to a particular part of the country. A few years ago tax delinquencies reached

*Chancellor, 10th Chancery Court District; Hattiesburg, Mississippi.

such an extent that forty-five states passed laws which tried to make the plight of the delinquents as pleasing as possible. The indulgences granted ranged from minor extensions of the date on which delinquency begins, through easy-payment plans, to actual compromise of the amount due in some jurisdictions.

There certainly is no reason why owners of income-producing property should neglect payment of the taxes thereon for other costs in operating that property, nor should they be permitted to "milk" such property at the expense of the public generally.

It is the duty of every taxpayer to have his property assessed; and if he fails to do so, then it is the duty of the tax assessor to assess it. The property should be assessed by a valid description so that if the taxes are not paid thereon and the property should sell for delinquent taxes, then the purchaser at such sale, whether it be the State, or an individual, will receive a good and marketable title to the property. Tax titles must be marketable in order to have the widest possible number of purchasers. The object is not to sell to tax speculators but to people who are interested in improving the land and paying taxes on it. Thus the property is not only returned to the tax roll, but there is every likelihood that tax collections will be made in the future. Tax titles in Mississippi do not have such legal force and effect as to bring more than taxes, damages, costs, etc., or a nominal consideration at a tax sale.

Section 1 of the Mississippi Constitution provides:

> "The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."[1]

Section 79 provides:

> "The legislature shall provide by law for the sale of all delinquent tax lands. The courts shall apply the same liberal principles in favor of such titles as in sale by execution. The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments, of any and every character whatsoever, shall exist, on conditions to be prescribed by law, in favor of owners and persons interested in such real estate for a period of not less than two years."[2]

The Legislature of Mississippi seems to have been steadily determined to compel every landowner to bear his just share of the burdens of

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[1] MISS. CONST. (1890) § 1.
[2] *Id.* § 79.

government, and to this end has continually enacted that the deed of the tax collector shall be prima facie evidence that the tax collector performed all things required by law of him.[3] The courts of this state seem as steadily to have opposed this legislation.

The Supreme Court of Illinois, speaking of similar action in that State, says:

> "These enactments were, no doubt, designed to dispense with the strictness of the common law in the summary proceeding for the levy and collection of taxes—to remove and wipe out all technical objections in the raising of the revenue—thus placing the taxpayer who honestly owes his tax to the government, which affords him protection, on precisely the same footing as any other person who owes an honest debt. Nor should the courts interpose objections to thwart the legislative will."[4]

The decisions previous to the Constitution of 1869 were practically unanimous against the validity of tax titles. Of these, attention may be called to *Griffin v. Mixon*,[5] which declared unconstitutional an 1850 statute providing for tax sales, although a later case, *Griffin v. Dogan*,[6] held an almost exact 1860 statute to be constitutional.

Section 8, Article XII of the Constitution of 1869 provided:

> "The Legislature at its first session shall provide by law for the sale of all delinquent tax lands. The Courts shall apply the same liberal principles in favor of such titles as in sale by execution."[7]

In the adoption of a new Constitution, the convention is presumed to have known the judicial construction placed on the former. Under the former Constitution of Mississippi the Courts had applied to tax titles the most strict and rigid rules and this provision of the new Constitution was evidently intended to reverse those rules. Chief Justice Sharkey in the case of *Doe* dem. *Helm v. Natchez Ins. Co.* draws the distinction between sales by execution and by the collector, for the nonpayment of taxes as follows:

> "We must admit the doctrine. . . that a sale made under a naked power derived from a statute, uncoupled with an interest, will be void, if the statute is not strictly pursued; and if the validity of a deed made under such sale depends upon a matter *in pais* the party claiming under it is bound to prove performance

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[3]Miss. Code Ann. (1942) § 1739.
[4]Beers v. People, 83 Ill. 488, 493 (1876).
[5]38 Miss. 424 (1860).
[6]48 Miss. 11 (1873).
[7]Miss. Const. (1869) Art. XII, § 8.

> of the act. . . [A tax collector] derives all his power from a statute; . . . [the sheriff] derives his power from a judgment. Sales by a sheriff are judicial sales, whereas a tax collector's sale is a statutory sale."[8]

In *Minor v. President and Selectmen of Natchez* Chief Justice Sharkey said:

> "A tax collector sells by a naked power because there is no judgment. The matter begins and ends with him; hence the statute must be strictly pursued. It is a special power and like a limited jurisdiction; everything must be shown to make the sale valid. But a sheriff sells under a court of general jurisdiction and the purchase depends upon the judgment, the execution and the sale."[9]

In *President and Selectmen of Natchez v. Minor* the Court said:

> "But it is said there is no reason for a distinction between sales made by sheriffs and those made by tax collectors and administrators, and in cases of the latter description, the purchaser is bound to prove that the statute has been strictly complied with. In regard to tax collectors' sales, the points of difference are obvious. His whole power is derived from the statute, and his authority depends upon a strict compliance with the statute. The strictness requisite in such cases has its origin in that great fountain of the law which regulates powers. A special or limited power must be strictly pursued, but more latitude is allowed in the exercise of a general authority."[10]

Doe dem. *Hodge v. Wilson* involves a tax sale and a case of the failure of a collector to sell by subdivisions. Justice Clayton in this case said:

> "In this case the first inclination of my mind was in favor of the legality of this sale and the consequent affirmance of the judgment. But the uniform language of the books is, 'That in the case of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of that power must precede its exercise; that the agent must pursue the power, or his act will not be sustained by it.'. . . The power of a tax collector to make a sale is of that character."[11]

Virden v. Bowers[12] and *Wolfe v. Murphy*[13] hold that the essential things which create authority in the tax collector to collect the taxes by sale are: (1) a legal assessment (that constitutes the owner of the property a debtor to the state); (2) a delivery of the assessment roll to the collector (that authorizes him to receive the money as therein charged

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[8] 8 Smedes & M. 197, 209 (Miss. 1847).
[9] 4 Smedes & M. 602, 631 (Miss. 1845).
[10] 10 Smedes & M. 246, 264 (Miss. 1848).
[11] 12 Smedes & M. 498, 505 (Miss. 1849).
[12] 55 Miss. 1 (1877).
[13] 60 Miss. 1 (1882).

against property or persons); (3) default in payment on the day appointed by law, giving him power to distrain and sell. If these concur the Constitution is imperative that the courts shall regard the sale with the same indulgences and favor as it does that of a sheriff under execution. But in the case of *Caston v. Caston,* the Court said:

> "Sect. 8 of Art. XII of the Constitution, which declares that 'the courts shall apply the same liberal principals in favor of such titles (tax-titles) as in sales by execution,' applies only to that class of cases in which, the power of sale existing, it has been defectively or irregularly executed. It has no operation as to those matters which are necessary to be done to confer such power."[14]

In *Howie v. Alford*[15] the court held that the provisions for the application of the same liberal principles in favor of tax titles as in sales by execution will not be invoked to uphold a tax title obtained in violation of statute, which perhaps by legislative blunder, required the filing of the sheriff's deed on the same day on which sale of tax delinquent property was to be made.

Assessment

Section 112 of the Mississippi Constitution provides:

> "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county."[16]

Several code sections have been enacted to deal with the duty of the individual to turn in his property for assessment purposes. They also provide that if the individual fails to turn in a list of his property for taxation, or assessment purposes, then it is the duty of the tax assessor to see that all of the lands of the county are properly assessed on the assessment roll.[17]

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[14]60 Miss. 475, 478 (1882).
[15]100 Miss. 485, 56 So. 797 (1911).
[16]Miss. Const. (1890) § 112.
[17]Miss. Code Ann. (1942) §§ 9756, 9766, 9771.

Section 9744 provides in part as follows: ". . . but the taxes shall be a charge on the land or personal property taxed and the sale shall be a proceeding against the thing sold."[18] This clearly is a proceeding in rem. However, the old case of *Moores v. Thomas* states in part as follows: "The decisions in other states, whose statutes are different from ours, and much in the works on Tax Titles, are wholly inapplicable here, where our system is *sui generis* in many respects."[19]

Section 9770 provides for the separate assessment of various interests in real estate, including mineral interests, when owned separately from the fee or surface estate.[20] This statute has been the subject of two recent decisions. In the case of *Smith County Oil Co. v. Board of Supervisors of Simpson County*[21] it was held that where the mineral estate had been severed from the surface, and the owner of the mineral estate executed an oil and gas lease to an oil company, the assessment of the lessor's one-eighth interest in the oil and gas by the Board of Supervisors was unauthorized and void. In *Stern v. Parker*[22] it was held that minerals separately owned but not separately assessed and paid on would go with the land to the State in a tax sale where no exception of the minerals was made in the assessment. The case was one in which there had been reserved a one-half interest in all minerals. The opinion was in part as follows:

> ". . . The land had appeared upon the assessment rolls by its definite governmental description, and had thus come under the eyes of the proper assessment and taxing authorities, and by such descriptions the land had been assessed, and sold for non-payment of the taxes. This was sufficient to carry with it the title of the entirety of the land, both above and below the surface for the reasons stated, and in harmony with out statutes and decisions. There have been called to our attention and we are aware of well-reasoned opinions of courts of some other jurisdictions, and rules in some texts based thereon, holding contrary to the rule in our jurisprudence. Our own statutes and judicial precedents must control in Mississippi, however.
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> "If we were to reverse the decree of the learned chancellor in this case, we would put owners of some estates in lands in a position to escape taxes altogether in some cases, and certainly to withhold tax payments until they should in the course of years decide, due to change in conditions, such as prospect of oil or

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[18] *Id.* § 9744.

[19] 95 Miss. 644, 651, 48 So. 1025, 1027 (1909). It will be observed that Section 4255 of the Code of 1906 contains the identical language as Section 9744 of the Code of 1942 on this particular point.

[20] Miss. Code Ann. (1942) § 9770.

[21] 25 So. (2d) 457 (Miss. 1946).

[22] 25 So. (2d) 787 (Miss. 1946).

> gas or other minerals, to pay the taxes by the expedient of back assessment for fifteen years. And this, too, in spite of the contingency that in the meantime, the lands by a tax sale, valid in all steps of the requisite procedure, except the performance of their duty by delinquent complaining owners, the lands, or estates therein, have passed, as here, into other hands by statutory procedure duly followed."[23]

The Mississippi Legislature in its 1946 session enacted a transaction tax on minerals, royalties and leasehold interests in lieu of an ad valorem tax. All such interests presently owned when the act goes into effect 60 days from April 4, 1946, are exempted on the payment of an amount equal to and in lieu of the transaction tax applicable thereafter. The amount of tax is briefly as follows: On all instruments conveying minerals, royalties, or leasehold interests for a primary term of ten years or less, 3 cents per mineral acre; when the primary term is more than ten years and not more than twenty years, 6 cents per mineral acre; when the primary term is more than twenty years (which would include perpetual conveyances), 8 cents per mineral acre. The State Auditing Department will furnish to the Chancery Clerk documentary stamps and the documentary stamps will be purchased from the Chancery Clerk and affixed to the instrument and cancelled by the Clerk. On all minerals separately owned at the time of the passage of this Act, an application will have to be made to the Chancery Clerk and the documentary stamps will be purchased and put on the application and cancelled by the Clerk, otherwise, the ad valorem tax on separately owned minerals will continue to apply.[24]

Section 9775 provides for the description of land on the assessment roll, and particularly as to the sufficiency of the description.[25] In passing on the sufficiency or the legality of the description the court has held that where there has been a legal description with more or less acreage noted, the legal description controls and the acreage, therefore, is not material and does not control.[26]

Other code sections deal with the duties of the Board of Supervisors and the State Tax Commission in equalizing the roll, giving notice to taxpayers, making the levy and the final approval by the State Commission.[27]

The tax assessor having completed and filed his rolls, the Board of Supervisors is then charged with performing certain specific duties there-

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[23]*Id.* at 791.
[24]H. B. 868 (not yet published).
[25]MISS. CODE ANN. (1942) § 9775.
[26]Austin v. Sullivan, 135 Miss. 741, 100 So. 275 (1924); Johnson v. Carter, 193 Miss. 781, 11 So. (2d) 196 (1943).
[27]MISS. CODE ANN. (1942) §§ 9785-9802.

after. The minutes of the Board of Supervisors must affirmatively show the giving of notice to taxpayers, and without such evidence a tax sale made thereafter is void and conveys no title, and evidence *aliunde* the record is not permitted to prove this jurisdictional requirement.[28]

The roll, after the assessment is equalized and approved, is then, in a recapitulated form, sent to the State Tax Commission for its approval. The State Tax Commission approves the roll as submitted, or directs certain changes in the assessment, and the Board of Supervisors should enter on its minutes the order of the State Tax Commission approving the roll or show compliance with the order of the State Tax Commission correcting the roll. The roll is then ready for transmittal to the tax collector.[29]

In *Evans v. Board of Supervisors*[30] the court has set out the procedure to be followed in appealing from objections made to the assessment.

The tax levy for the fiscal years is required to be made at the October meeting of each year, and if not made then at any other regular, adjourned or special meeting thereafter.[31] An additional levy, made after the proper time for levying taxes, is void and no title is conveyed by a sale for taxes including the additional levy.[32] But, on the other hand, if taxes are reduced subsequent to the regular levy, the taxpayer cannot complain.[33]

The most glaring defect arising on the part of the board of supervisors has been the failure of the president of the board to sign each day's minutes before final adjournment and such failure has been held to void a tax sale.[34]

When the Board of Supervisors has transmitted the assessment roll to the tax collector the roll becomes the warrant by which the tax collector enforces the payment of taxes.[35] The tax collector has no authority, on his own initiative, to change the assessment as shown on the roll, and, if he does so, a sale under a description changed by the sheriff conveys no title.[36]

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[28]Henderson-Molpus Co. v. Gammill, 149 Miss. 576, 115 So. 716 (1928); Federal Land Bank v. Cox, 183 Miss. 250, 183 So. 482 (1938).

[29]Yellow Pine Trustees v. State, 146 Miss. 101, 112 So. 12 (1927); Tatum v. Smith, 158 Miss. 511, 130 So. 683 (1930).

[30]192 Miss. 188, 5 So. (2d) 224 (1941).

[31]Miss. Code Ann. (1942) § 9889.

[32]Gamble v. Witty, 55 Miss. 26 (1877).

[33]McCready v. Lansdale, 58 Miss. 877 (1881); Havard v. Day, 62 Miss. 748 (1885).

[34]Gardner v. Price, 21 So. (2d) 1 (Miss. 1945); Brand v. Board of Supervisors of Newton County, 21 So. (2d) 579 (Miss. 1945).

[35]George County Bridge Co. v. Catlett, 161 Miss. 120, 135 So. 217 (1931).

[36]Speed v. McKnight, 76 Miss. 723, 25 So. 872 (1899); Gibbs v. Hall, 38 So. 369 (Miss. 1905); Fountain v. Joullian, 110 Miss. 812, 71 So. 2 (1916).

The assessment roll must contain a valid description of the land because the assessment roll when delivered to the sheriff is his warrant for collecting the taxes due and is his warrant for selling the land at the tax sale if default is made in the payment of the taxes, and, as heretofore stated, the sheriff is not authorized to change the description of the land but must sell it as it appears on the roll furnished him.

The general rule is that the assessment itself must correctly describe the land or must furnish the clue that if followed will lead to a correct description. As clearly stated by Mr. Justice Campbell in the case of *Dodds v. Marx,* "The roll must furnish the clue which, when followed by the aid of parol testimony, conducts certainly to the land intended. It is admissible only to apply the description on the roll, which must give the start and suggest the course, which, being followed, will point out the land intended to be assessed."[37]

The NW¼ of NW¼, less 10 acres in the Southeast corner thereof is a good description. The NW¼ of NW¼ less ten acres off the South side or off the East or West or North side is likewise a good description. The NW¼ of NW¼ less 10 acres owned by John Doe is a good description. The NW¼ of NW¼ less part sold to John Doe as described in deed Book 66 at page 66 is a good description. The following descriptions in tax deeds have been held by our Supreme Court to be valid, to-wit: W½xNW¼-SE¼xNW¼;[38] S part of Sec. 29, T. 3, R. 11, 80 acres;[39] Spanish Claim Sec. 13, T 4, R 1 E, 640 Acres; [40] S. fr. SE¼, 33 acres;[41] 14 A off NE cor. E½ SE¼ Sec. 20 and 13 A. off N and W½ SW¼ lying N of road Sec. 21, etc.; [42] Fr'l N½ Sec. 14;[43] E pt. SW¼ Sec. 38, T 1, R 1 W, 20 acres;[44] W. pt. NW¼, Sec. 29,T. 1, R. 8, 110 acres;[45] Fr. 38 A in SE¼ NW¼ Assessed to C. (2 acres shown in evidence);[46] 40 A. in W½ NW¼ Sec. 24, T 25, R 2 W West of Bayou;[47] E½ W of Bowie, Sec. 32, T 5 N. R. 13 W.;[48] S. pt. NW¼, Sec. 18, T 16, R 4, 42 acres; NE¼ fr. less 10 A Sec. 13, T. 16, R 3, 120 A; 16 A N end SW¼ Sec. 18, T. 16, R. 4; N½ SE¼ Sec. 13, T. 16, R 3, 32 acres all known as I. P. Beasley Old Home Place.[49]

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[37]63 Miss. 443, 446 (1886).
[38]Moores v. Thomas, 95 Miss. 644, 48 So. 1025 (1909).
[39]Webb v. Mobile & O. R. R., 105 Miss. 175, 62 So. 168 (1913).
[40]Havard v. Day, 62 Miss. 748 (1885).
[41]Woods v. Linder, 194 Miss. 226, 11 So. (2d) 900 (1943).
[42]Bowers v. Chambers, 53 Miss. 259 (1876).
[43]Selden v. Coffee, 55 Miss. 41 (1877).
[44]McCready v. Lansdale, 58 Miss. 877 (1881).
[45]Wheeler v. Lynch, 89 Miss. 157, 42 So. 538 (1906).
[46]Illinois Cent. R. R. v. LeBlanc, 74 Miss. 650, 21 So. 760 (1897).
[47]Reed v. Heard, 97 Miss. 743, 53 So. 400 (1910).
[48]Mixon v. Clevenger, 74 Miss. 67, 20 So. 148 (1896).
[49]Beasley v. Beasley, 177 Miss. 522, 171 So. 680 (1937).

The description in the recent case of *Jefferson v. Walker*[50] was E½ SW¼ and NW¼ SW¼, less 6 A, Sec. 2, T 2 R 18. The lower court held that the first call, E½ of SW¼ was a valid description and confirmed the complainant's title to said land, but the second call, to-wit, the NW¼ SW¼, less 6 A, the lower court held to be void for uncertainty. It did not say where the 6 A was, nor out of which part of the forty it would be carved; a surveyor could not take this description and survey the land because the description itself, which was the exact description on the assessment roll, did not furnish a clue which if followed would certainly lead to the land intended to be sold. A cross appeal was filed in this case and the Supreme Court affirmed the lower court's decision as to the first call as above quoted, but reversed and rendered a decree in the Supreme Court confirming the title to the NW¼ SW¼ less 6 A. In overruling a suggestion of error, the Court commented as follows:

> ". . . we have concluded to reaffirm, as the law of this State, the rule announced in the cases of Reed v. Heard, 97 Miss. 743, 53 So. 400, and Albritton v. Fairley, 116 Miss. 705, 77 So. 651, to the effect that while the statutes hereinbefore mentioned do not permit parol testimony to aid in a description where it is utterly void on the assessment roll or in a conveyance for taxes, nevertheless, as expressly stated in Reed v. Heard, and held in effect in Albritton v. Fairley, such testimony may always be resorted to whether the ambiguity is *patent* or *latent,* where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land *by the aid of such testimony.*[51]
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> ". . . But it is urged in the case at bar that under the authority of Carr v. Barton, Brown v. Womack, and other decisions of this Court, we cannot look to the name of 'True Light School' under the caption, 'To whom assessed,' to see who owns the other six acres in the NW¼ of SW¼, even though the True Light School is assessed on the roll with '6 A. in NW¼ of SW¼.' And be that as it may, there seems to be no good reason why one may not take the description in the assessment to Alex Jefferson of 'NW¼ of SW¼ less 6 A' in Sec. 2, T. 2, R. 18 W., and by using the 'less 6 A.' as the clue, find out from the deed records who owns the other 6 acres in the subdivision under a description identifying its location definitely. The parol testimony authorized by the statutes in question, when admissible at all, is not confined to the assessment roll, and such testimony is always admissible where the whole tract or division is assessed, with an exception of a given number of acres therefrom which can be applied to a given tract of land by the aid of parol testimony, and also under

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[50]24 So. (2d) 343 (Miss. 1946).
[51]Jefferson v. Walker, 26 So. (2d) 239, 240 (Miss. 1946).

such facts as were disclosed in the cases of Reed v. Heard, and Albritton v. Fairley, supra."[52]

The following land descriptions in tax sales have been held void by the Supreme Court: 143 Acres in Quarter Section;[53] 40 acres in quarter section;[54] 20 acres in E½ SE¼, insufficient to convey 20.66 acres of south end;[55] 20 acres in Sec. 39, T. 16 R. 4 E;[56] 200 acres in Sec. 2 T 12 R 1 E;[57] Bal. Fr. Sec. 11, T 5 R 12, 522 acres;[58] Bal. of Sec. 8, T 12 R 17 W;[59] 37 acres in N½ Sec. 1, T 13 R 4;[60] 80 acres of SE¼, Sec. 10, T 8 R 8, in Itawamba County;[61] NE½ of Section.[62]

Tax Sales

The statutes authorize the tax collector to sell all lands on which the taxes have not been paid, on the first Monday of April and the third Monday of September of each year.[63]

A great many attacks have been made on sales wherein the proof showed that the tax collector failed to offer a large tract in 40-acre blocks as required by law. In these cases the court has uniformly held that a departure from offering the property for sale in 40-acre blocks invalidated the tax sale.[64] Where there is an assessment of an undivided one-half interest in 80 acres, the property involved must be offered in 40-acre tracts.[65]

The statute provides two dates on which lands shall be sold for taxes—the first Monday in April and the third Monday in September. If a sale is not held on the first date, then no sale may be ordered or held prior to the

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[52]*Id.* at 244. This opinion contains a lengthy discussion of pertinent cases, distinguishing particularly Carr v. Barton, 173 Miss. 662, 162 So. 172 (1935), Hatchett v. Thompson, 174 Miss. 502, 165 So. 110 (1936), and Brown v. Womack, 181 Miss. 66, 178 So. 785 (1938). The opinion was of course based largely on Sections 9773 and 9775 of the Code of 1942. The original decision created great interest among the bench and bar of Mississippi because of its apparent conflict with the above and other former decisions of the Court.

[53]Dingey v. Paxton, 60 Miss. 1038 (1883).

[54]Sims v. Warren, 67 Miss. 278, 7 So. 226 (1890).

[55]Smith v. Hickman, 24 So. 973 (Miss. 1899).

[56]Crawford v. McLaurin, 83 Miss. 265, 35 So. 209 (1903), *suggestion of error overruled*, 83 Miss. 278, 35 So. 949 (1904).

[57]Yandell v. Pugh, 53 Miss. 295 (1876).

[58]Selden v. Coffee, 55 Miss. 41 (1877).

[59]Pearce v. Perkins, 70 Miss. 276, 12 So. 205 (1892).

[60]Nelson v. Abernathy, 74 Miss. 164, 21 So. 150 (1896).

[61]Sims v. Warren, 68 Miss. 447, 10 So. 40 (1890).

[62]Wilson v. Wilson, 97 Miss. 423, 52 So. 353 (1910).

[63]Miss. Code Ann. (1942) §§ 9921, 9922, 9923, 9926, 9928.

[64]Herring v. Moses, 71 Miss. 620, 14 So. 437 (1893); Womack v. Central Lbr. Co., 131 Miss. 201, 94 So. 2 (1922); Talmadge v. Seward, 155 Miss. 580, 124 So. 791 (1929).

[65]Stevenson v. Reed, 90 Miss. 341, 43 So. 433 (1907).

second date for sale. Should a sale be made between the two dates it is invalid and no title passes.[66] The board may not anticipate that a sale for taxes will not be held on the date set by law but must await the passing of the date before ordering another sale date.[67]

In the case of *Burroughs v. Vance*[68] the court held that an owner may pay the tax to the sheriff after the sale is made, but before the purchaser pays his bid and obtains a receipt therefor.

It has been the practice of some boards of supervisors to authorize the striking of tax sales but no authority has been given by the legislature which would permit such action on the part of the board. The authority of the board of supervisors is limited strictly to that conferred by statute.[69]

When there is an assessment and sale of land the following year, a distinction is made according to whether it is sold to an individual or to the state. Land sold to the state is not subject to further sale until redeemed from such sale; whereas land sold to an individual is subject to sale the following year for its unpaid taxes.[70]

In the case of *Leavenworth v. Claughton*[71] the court had before it a suit to confirm title by a patentee who had purchased from the State land sold by the tax collector in Forrest County, Mississippi, on April 6, 1931, for delinquent taxes for the year 1930. The validity of the sale was attacked on several grounds but the main ground was that the land was a contiguous tract, owned by the same owner, Leavenworth, but was sold by the tax collector separately. In support of the contention that it was sold separately by the tax collector, the appellants urged that the sales were numbered and the land in the southern part of Section 6 assessed to Leavenworth was designated No. 217 and at the top of this column were the words "Sale Number" and the land sold in the north part of Section 7, which of course joined the south part sold in Section 6, was designated No. 218 under the same column. The appellants also contended that the amount of taxes, damages and interest were figured separately on the line No. 217 and the line No. 218 and because of these "sale numbers" and because of the amount of money being figured separately on each line, it was urged that these defects would overthrow the presumption that the tax collector

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[66]Smith v. Hendrix, 181 Miss. 229, 178 So. 819 (1938); White v. Noblin, 183 Miss. 92, 183 So. 914 (1938).

[67]Brougher v. Conley, 62 Miss. 358 (1884); Clarke v. Frank, 64 Miss. 827, 3 So. 531 (1887); Smith v. Hendrix, 181 Miss. 229, 178 So. 819 (1938); White v. Noblin, 183 Miss. 92, 183 So. 914 (1938).

[68]75 Miss. 696, 23 So. 548 (1898).

[69]Jackson v. Webster, 196 Miss. 778, 18 So. (2d) 298 (1944).

[70]Erwin v. Lee, 118 Miss. 194, 79 So. 104 (1918).

[71]197 Miss. 606, 19 So. (2d) 815 (1944).

sold the land as provided by law. This was a case of first impression in the State on this exact point. The Supreme Court had specifically held in the case of *Neal v. Shepard,*[72] which involved a sale by the tax collector to an individual, that the tax deed itself overthrew the presumption because there were two sales and two deeds, and because the recitals therein were contrary to the presumption that he sold the contiguous land in one sale; but the exact point in *Leavenworth v. Claughton* had never been passed upon. Section 9935 of the 1942 Code reads in part as follows: ". . . All such lists shall vest in the State or in the individual purchaser thereof, a perfect title to the land sold for taxes, but without the right of possession for the period of and subject to the right of redemption; *but a failure to transmit or record a list, or a defective list shall not affect or render the title void.*"[73] In spite of this section the court held that the designation on the list as sales No. 217 and No. 218 overthrew the presumption that the sheriff sold it according to law, and reversed the holding of the lower court. The patentee did not prove sufficient possession of the land to have cured this defect.

A short time thereafter, on December 22, 1944, the Supreme Court decided the case of *State v. Wilkinson,*[74] the opinion being delivered by Mr. Justice McGehee. In this case the court had before it the validity of a tax sale where five separately assessed parcels of land, comprising one tract, had been sold by the tax collector at a tax sale. The amount of taxes, damages and interest had been figured separately on each of the five lines on which the land was assessed, but all of the land was assessed to the same owner, but was on more than one page of the tax roll. The court held that this was a valid sale, and that the amount of money figured separately on each line of the separate assessment did not overthrow the presumption of law that the tax collector did his duty in making the sale. A suggestion of error was filed in this case and was decided February 12, 1945; Judge Griffith delivered the opinion and said in part:

> ". . . As pointed out in our original opinion, there is no requirement anywhere in any of these statutes that the tax collector shall show anything whatever on his list other than as above stated.
>
> "But now appellees say that the fact that the tax collector did in this respect actually what the law required him to do, no more and no less, has caused him thereby to furnish all of the evidence needed that he sold the five separately assessed contiguous parcels, although assessed to the same owner, in five sales instead of one,

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[72]157 Miss. 730, 128 So. 69 (1930).
[73]Miss. Code Ann. (1942) § 9935.
[74]197 Miss. 628, 20 So. (2d) 193 (1944).

> and likewise as to the two other separately assessed parcels—in brief, that his full compliance with the law has furnished all of the evidence needed that he did not comply with it. We believe that no precedent for such an odd result can be found anywhere and we adhere to our originial opinion."[75]

At first it would appear that Section 9935, which provides that a title is not made void if the tax collector fails to transmit and record the list, or if he fails to file his list, or if he files a defective list, was repealed by judicial interpretation. However, this statute has been quoted with approval in two subsequent cases.[76]

The decisions in the cases of *Leavenworth v. Claughton* and *State v. Wilkinson* seem to be inconsistent and have caused considerable confusion in the minds of members of the bar all over the state. It will be noted that the only distinction made in these two cases was the so called sale number, and in the former case it would appear that if the tax collector had not filed any list at all, the sale would have been valid under Section 9935.

Since the act passed during the Extraordinary Session of 1938,[77] property is sold as it is assessed on the roll and a sale since that time under the same facts and circumtances as the sale in *Leavenworth v. Claughton* would of course be valid, but all sales made prior to that time under the same facts and circumstances would be invalid.

Redemption

Code Section 9948 provides in part as follows:

> "The owner, or any person for him with his consent, or any person interested in the land sold for taxes, may redeem the same, or any part of it, where it is separable by legal subdivisions of not less than forty acres, or any undivided interest in it, at any time within two years after the day of sale, by paying to the chancery clerk, regardless of the amount of the purchaser's bid at the tax sale, the amount of all taxes for which the land was sold, with all costs incident to the sale, and five per centum damages on the amount of taxes for which the land was sold, and interest on all such taxes and costs at the rate of one per centum per month, or any fractional part thereof, from the date of the sale, and all taxes and costs that have accrued on the land since the sale, with interest thereon from the date such taxes shall have accrued, at the rate of one per centum per month, or any fractional part thereof. . ."[78]

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[75]197 Miss. 651, 652, 20 So. (2d) 836 (1945).

[76]Clanton v. Callender, 22 So. (2d) 487 (Miss. 1945); Seward v. Dogan, 20 So. (2d) 89 (Miss. 1944), *suggestion of error sustained,* 21 So. (2d) 292 (Miss. 1945).

[77]Miss. Code Ann. (1942) § 9923.

[78]*Id.* § 9948. It will be noted that a special enactment of the Legislature gave the taxpayers three years to redeem, instead of two years, during the period from 1931 to 1934; but they now have only two years in which to redeem.

In *Kelly v. Coker* the Court said:

> "Two of the complainants testify positively that they went to the chancery clerk's office on two occasions carrying money to redeem the land from the sale. Each testified that their expressed purpose was to redeem it but that on each occasion the clerk told them 'there was not taxes due on the place, it had been paid.' He further told them that payment had been made by Burwell. They testified that they told the Clerk they wanted to redeem it, and that they had the money to do so. It is abundantly disclosed that these owners knew of the necessity and procedure for redemption. In fact, another tract was redeemed by them shortly thereafter and negotiations were sought to get a release from Burwell. The Clerk had died in the meantime and there was no testimony to contradict or modify the foregoing positive statements. Under the circumstances, the learned chancellor was not justified in his finding that there was no offer to redeem. Tarver v. Lindsey, 161 Miss. 379, 137 So. 93. The offer and request to redeem when the party is ready and able to do so, where refused either arbitrarily or through unintentional misrepresentation of facts, took away from the state the power to convey the title to Burwell. McLain v. Meletio, 166 Miss. 1, 147 So. 878. See also Brannan v. Lyon, 86 Miss. 401, 38 So. 609. The tax deed to Burwell is therefore invalid."[79]

Code Section 9957 requires the Chancery Clerk within thirty days after the period of redemption has expired to certify to the State Land Commissioner, on a form provided by that officer, a list of all lands struck off to the State which have not been redeemed.[80]

Tax Forfeited Land Patents and Tax Deeds

Code Section 9958 is as follows:

> "When the period of redemption has expired the chancery clerk shall, on demand, execute deeds of conveyance to individuals purchasing lands at tax sales. Which conveyances shall be essentially in the following form towit: [the statute then sets forth the form of the conveyance.]"[81]

This statute also provides that the conveyance shall vest in the purchaser a perfect title with the immediate right of possession of the lands sold for taxes.

The statutes authorize the State Land Commissioner, with the approval of the Governor, to sell lands forfeited to the state for non-payment of taxes, subject to limitations.[82] Code Section 4073 provides in part as follows:

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[79]Kelly v. Coker, 197 Miss. 131, 134, 19 So. (2d) 519 (1944).
[80]Miss. Code Ann. (1942) § 9957.
[81]*Id.* § 9958.
[82]*Id.* Title 17, Ch. 11.

"In all cases where it appears that the claim of title of the State to the lands on the records of the land office was acquired under tax sales which were void and which passed no title to the State, the Land Commissioner, with the written approval of the Attorney-General, is hereby authorized and directed to strike such lands from the list of lands sold to the State for delinquent taxes. . . The striking of such lands from the lists of forfeited State tax lands in the Land Commissioner's office, as herein provided for, shall cancel all title or claim of the State to such lands, except for taxes due thereon at the time of the sale and accruing after the sale."[83]

As an example, listed below are five land descriptions in tax sales that were cancelled by the Attorney General as provided in the above statute:

1. S½ of NW¼ less 23 acres Section 24, Township 2, Range 13, Marion County, Mississippi, sold to the State Oct. 30, 1933, and stricken off for indefinite description approval of the Attorney General June 30, 1939.

2. SW¼ of SW¼ less 15 acres of Section 19, Township 2, Range 14 East, Marion County, Mississippi, sold to the State Sept. 20, 1937, and stricken off indefinite description approval of Attorney General June 7, 1940.

3. NE¼ of SW¼ less 2 acres Section 14, Township 2 Range 17, Marion County, Mississippi, sold to the State Sept. 19, 1932, and stricken off approval of Attorney General Feb. 20, 1941.

4. E½ of NE¼ of NW¼ less 5 acres Section 12, Township 2, Range 17 West, Marion County, Mississippi, sold to the State June 1, 1931, and stricken off approval of Attorney General July 11, 1944, indefinite description.

5. W½ of SW¼ of NW¼ less 6 acres and NW¼ of SW¼ less 8 acres Section 5, Township 1 Range 14 West, Marion County, sold to the State June 1, 1931, and stricken off approval of Attorney General August 3, 1945.

Section 4078 authorizes the Land Commissioner, with the approval of the Governor, to sell any lands which may be forfeited to the State for the non-payment of taxes, after the time provided by law for redemption shall have expired, to any bona fide purchaser for such price as the Land Commissioner with the approval of the Governor may fix, provided, however, that the minimum price for such forfeited tax land shall be $1.00 per acre, except as otherwise provided in the Act. The Act then provides that where the Land Commissioner has reason to believe that the land is worth more than $1.00 per acre he shall cause an inspection to be

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[83] *Id.* § 4073.

made and appraisement of the property and then the Land Commissioner, with the approval of the Governor, may sell at the price fixed. The Act also provides that the Land Commissioner may sell State land for less than $1.00 per acre only when it appears that the actual value of the land is less than $1.00 per acre.[84]

In *Mortimer v. Curle*[85] it was held that the fixing of the price of sale to the former owner and issuance of a patent to him by the Land Commissioner, with the approval of the Governor, together with the delivery of the patent and payment of the purchase price, left these officials without power or authority to thereafter approve, sign and deliver another patent to the same land to another party, notwithstanding that the latter's application was first in point of time.

The State Land Commissioner cannot validly sell the lands of the State at a grossly inadequate consideration. In a case where the consideration was less than one-fourth of the lowest estimate made by any qualified witness who made any estimate at all, and the facts showed that this lowest estimate was itself an extreme one, the Court held that the patent must be cancelled, notwithstanding that the Land Commissioner himself set the appraisal value.[86]

Section 4079 of the Code provides the method by which application is made to purchase State tax forfeited lands, and sets out the required contents of the application.[87] It has been held that the purpose of this statute was to set up a procedure by which the State would be protected from the perpetration of fraud against it in the purchase of tax forfeited lands.[88] The filing of the required application is a condition precedent to the right to obtain a patent, and the application constitutes a part of the patentee's muniment of title with which a vendee of the patentee is charged with notice.[89] The Land Commissioner is without authority to waive the the information required by Section 4079 to be in the application.[90] The fact that the Land Commissioner is required to file the applications in the order received does not require him to issue a patent to the first applicant.[91]

Up until 1940 there was no method provided to sue the State of Mississippi to confirm tax forfeited land patents, but in 1940 the

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[84]*Id.* § 4078.
[85]183 Miss. 17, 183 So. 485 (1938).
[86]State *ex rel.* McCullen v. Tate, 188 Miss. 865, 196 So. 755 (1940).
[87]Miss. Code Ann. (1942) § 4079.
[88]State v. Lewis, 192 Miss. 890, 7 So. (2d) 871 (1942). For what constitutes "actual fraud", see State v. Roell, 192 Miss. 873, 7 So. (2d) 867 (1942).
[89]State *ex rel.* McCullen v. Adams, 185 Miss. 606, 188 So. 551 (1939).
[90]*Ibid.*
[91]Mortimer v. Curle, 183 Miss. 17, 183 So. 485 (1938).

Legislature authorized a patentee, or those holding through him, to file suit against the State to confirm, perfect and validate its forfeited land patent.[92] This Act provided that process should be served upon the Attorney General of the State. In view of the decisions cancelling tax forfeited land patents which had been acquired for a grossly inadequate consideration, and in view of the decisions, especially in the case of *State* ex rel. *McCullen v. Adams,*[93] holding that the application to purchase State land constitutes a part of the patentee's muniment of title, with which a vendee of the patentee is charged with notice, the courts were immediately flooded with a large number of suits to confirm tax titles against the State. From these suits we have a great number of decisions involving the validity of tax titles in Mississippi.

After the people of Mississippi began to recover from the severe depression of a few years ago, they began to purchase State lands. Then the discovery of oil in Mississippi greatly enhanced the potential value of lands, and resulted in an increased amount of litigation with reference to tax titles, which will continue for many years to come.

In *State v. Lewis*[94] and *State v. Rowell*[95] the constitutionality of the 1940 Act which authorized patentees to confirm against the state was questioned by the state on the ground that the amount paid was grossly inadequate and amounted to a donation of public lands in violation of Section 95 of the Constitution of 1890, but the Act was held to be constitutional. It has been a very popular law in that it has afforded patentees of the State and their grantees an opportunity to confirm their titles to lands on which valuable improvements have been made from time to time, and will continue to be made.

It will be noted from Section 1317 of the Code, which is a part of Chapter 309 of the Laws of 1940, that the duty is squarely on the court to enter a decree validating and perfecting the title of such land from the State, unless it shall appear to the court, and the court shall find as a fact, that the State has not acquired title to the land by virtue of the tax sale, or that the title to the land involved in the suit was divested out of the State of Mississippi without payment of the purchase price, or by reason of actual fraud on the part of the patentee or his representative, in either of which events it is the duty of the Court to enter a decree cancelling the patent.[96]

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[92]Miss. Laws 1940, c. 309.
[93]185 Miss. 606, 188 So. 551 (1939).
[94]192 Miss. 890, 7 So. (2d) 871 (1942).
[95]192 Miss. 873, 7 So. (2d) 867 (1942).
[96]Miss. Code Ann. (1942) § 1317.

Section 716 provides:

> "Actual occupation for three years, after two years from the day of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes, or in any precedent step to the sale, saving to minors and persons of unsound mind the right to bring suit within such time after the removal of their disabilities, and upon the same terms as is provided for the redemption of land by such persons."[97]

It appears that three years actual occupancy under a tax title will cure all defects and perfect the title except under a void description in tax deeds or forfeited tax land patents.[98]

Section 717 provides in part as follows:

> "The owner, mortgagee or other person interested in any land which has been heretofore or may be hereafter sold or forfeited to the State for delinquent taxes may bring a suit or action to cancel the title of the State, or its patentees, or to recover said land from the State, or its patentees, on account of any defect, irregularity or illegality in the assessment, levy or sale of such land for delinquent taxes, within two years after the date this Act becomes effective as to lands heretofore sold or forfeited to the State for delinquent taxes, and within two years after the period of redemption shall have expired, as to lands hereafter sold or forfeited to the State for delinquent taxes, and not thereafter. Provided, however, the limitations herein fixed shall not apply when the taxes on such land had been paid prior to the time it was sold for taxes, and provided, further, that the provisions of this Act shall not apply to lands sold to the State prior to January 1, 1928. . . ."[99]

This Act was enacted in 1934,[100] and appeared to be an attempt by the Legislature to provide a period of limitation within which suit could be brought to set aside a tax sale for any reason. The statute was first construed in the case of *Russell Inv. Corp. v. Russell,*[101] and was later more clearly explained in the cases of *Grant v. Montgomery,*[102] *E. L. Bruce Co. v. Smallwood,*[103] and *Lee v. Smith.*[104] In these cases it was held that the two year statute would not begin to run until there was an invasion of the original owner's possession; that the mere passage of two years

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[97] *Id.* § 716.
[98] Patterson v. Morgan, 161 Miss. 807, 138 So. 362 (1931).
[99] MISS. CODE ANN. (1942) § 717.
[100] Miss. Laws 1934, c. 196.
[101] 182 Miss. 385, 178 So. 815 (1938), *suggestion of error overruled,* 182 Miss. 411, 182 So. 102 (1938).
[102] 25 So. (2d) 491 (Miss. 1942).
[103] 188 Miss. 771, 196 So. 227 (1940).
[104] 189 Miss. 636, 198 So. 296 (1940).

time would not divest the original owner of his title. This was further discussed in *Leavenworth v. Claughton*,[105] where, on suggestion of error, the Court strongly indicated that the two year statute, without possession, might apply to sales made after the enactment of Chapter 196 of the laws of 1934. In this case the sale was made three years before passage of the Act. However, in these cases the court held that under the statute actual occupancy was not required but that the same type of possession would be required as would be necessary to prove title under the ten year adverse possession statute.

As it now stands, with the many decisions which would appear to be conflicting, it is difficult for the members of the Bar of the State to advise their clients with reference to tax titles. It is also difficult for the lower courts to decide the many close questions involved in tax title suits.

Under the Federal Constitution, lands patented by the Government and then transferred to an innocent purchaser for value, without notice, cannot be successfully attacked by the Government or anyone else; but the Mississippi Constitution of 1890 prohibits the passage of a statute that would act as a curative against the State in this manner. Therefore, a tax title is never perfected in Mississippi until it is confirmed in Chancery Court and passed upon by the Supreme Court, or the time for appeal has expired, and, as to non-resident defendants, until after the period of two years has expired.

Therefore, we urgently need some method by which tax titles could be perfected before they are certified to the State, so that the State, when it sold the land, would sell a good and merchantable title, and could of course receive more as the purchase price.

It has been suggested that the Board of Supervisors in each county, through its attorney, should be authorized by the Legislature to bring a suit to confirm the title on all lands that were not redeemed from tax sales. This judicial determination would presumably eliminate all defective titles at the confirmation hearing, so that the Chancery Clerk would certify to the State only those titles that had been dully confirmed by a court of competent jurisdiction, after all defendants had been properly summoned into court.

I offer this as one of many suggestions that the members of the Bar and the members of the Legislature can study, with the hope that some benefit will be derived from this article and from these suggestions. I also trust that this article will be used by the Bench and Bar as a hand-brief in trying and deciding suits involving tax titles in Mississippi.

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[105] 197 Miss. 606, 19 So. (2d) 815 (1944), *suggestion of error overruled*, 197 Miss. 651, 20 So. (2d) 836 (1945).

BILLS OF EXCEPTIONS

*Vardaman S. Dunn**

Since the advent of the official court reporter, the bill of exceptions is not frequently resorted to in modern practice. However, when the occasion presents itself, a litigant may lose substantial rights by a single procedural slip. The high percentage of failures in this field may be due in part, at least, to the general assumption that the law, as we know it today, is based upon justice, reason, and common sense. But unfortunately such considerations have not invaded the field of the bills of exceptions. To the end that the procedural pit-falls may be more sharply outlined, this attempt is made to state the law with reference to bills of exceptions in the circuit, chancery, and county courts of the state.

IN GENERAL

A. *Classification.*

Generally, bills of exceptions may be divided into two types and, for convenience, termed respectively special and general bills. Special bills may be defined as those necessary for placing of record the matters which transpire on the trial which for any reason are not noted by a court reporter or which could not otherwise be placed of record.[1] General bills, so called because they embrace the entire testimony and proceedings, other than the clerk's transcript, are proper in the cases where a court reporter takes the testimony and fails to furnish a transcript of his notes, as where the notes are lost or destroyed or where the reporter is unable or refuses to transcribe his notes.[2]

B. *When Available—In General.*

The basic difference between the two types of bills may be noted at the outset. The distinction is important because of the difference in procedural requirements.

The statutes authorize general bills only in the instances where a court reporter attends the trial and takes the proceedings. If, thereafter, a transcript of his notes is unavailable, a general bill is proper. Also, it has been held that the bill is proper where exhibits are found to be illegible,[3] or

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*Lotterhos, Travis & Dunn; Jackson, Miss.

[1]Miss. Code Ann. (1942) §§ 1531, 1639; Vicksburg & M. R. R. v. Ragsdale, 51 Miss. 447 (1875); Kennedy v. Little, 191 Miss. 73, 2 So. (2d) 163 (1941).

[2]Miss. Code Ann. (1942) § 1644.

[3]Planter's Oil Mill v. Yazoo & M. V. R. R., 150 Miss. 813, 117 So. 242 (1928), holding that the court in such instances should take the testimony and perfect the record.

if shown to have been introduced in evidence, are omitted from the record.[4] In case no court reporter attends the trial, the general bill is not permissible. The same thing is true where a part of the testimony is given in the absence of the reporter.[5] In such cases, the part not taken by the reporter must be included in the record by means of the special bill. Where a court reporter attends and takes the testimony, it must be shown that his notes are not available; otherwise, the bill is not permissible[6] except by agreement.[7] In the instances where the general bill is not allowed, a special bill must be perfected in the manner and within the time required by law.

C. *Courts to which Rules are Applicable.*

The statutes and rules governing both general and special bills of exceptions apply alike in the circuit, chancery, and county courts and to all proceedings therein. The same application is provided for in *habeas corpus* proceedings, contempt proceedings, except in the Supreme Court, and all "special proceedings." The same rules apply alike to trials in term time and in vacation and to trials in civil and criminal cases.[8]

The bill of exceptions as applied to hearing and trials before boards and other judicial or quasi-judicial bodies is not treated herein.

D. *Construction of Statutes—In General.*

An appeal is not a matter of right in the constitutional sense[9] and is strictly regulated and limited in all of its phases by statute.[10] The modern practice of reviewing the testimony and evidence introduced on the trial is

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[4]Williams v. State, 178 Miss. 694, 172 So. 746 (1937).

[5]Benjamin v. Virginia-Carolina Chem. Co., 126 Miss. 57, 87 So. 895 (1921).

[6]See Miss. Code Ann. (1942) §§ 1639, 1644.

[7]*Ibid.*

[8]See the following statutes: Miss. Code Ann. (1942) §§ 1523-24, 1531-35, 1537 (circuit courts generally); *id.* § 1313 (chancery courts); *id.* § 1275 (chancery courts, jury trials); *id.* § 2835 (*habeas corpus* proceedings); *id.* § 1152 (contempt proceedings); *id.* §§ 1532, 2532 (criminal proceedings); *id.* § 1639 (referring to all civil, criminal and probate matters and special proceedings); *id.* c. V (county courts); *id.* § 1523 (trial in vacation); *id.* § 1524 (trials by the court).

[9]Jackson v. Gordon, 194 Miss. 268, 11 So. (2d) 901 (1943); Tobias Bag Co. v. Delta Cotton Oil Co., 193 Miss. 873, 11 So. (2d) 210 (1942); McClanahan v. O'Donnell, 148 Miss. 478, 114 So. 336 (1927); State v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919); Bridges v. Clay Co., 57 Miss. 252 (1879).

[10]Jackson v. Gordon, 194 Miss. 268, 11 So. (2d) 901 (1943); Craig v. Barber Bros. Const. Co., 190 Miss. 182, 199 So. 270 (1940); Jones v. Cashin, 133 Miss. 585, 98 So. 98 (1923); State v. Poplarville Sawmill Co., 119 Miss. 432, 81 So. 124 (1919). The statutory requirements are jurisdictional and jurisdiction cannot be conferred upon the appellate court by waiver or consent. Jackson v. Gordon, 194 Miss. 268, 11 So. (2d) 901 (1943); Watkins v. Guess, 196 Miss. 438, 17 So. (2d) 795 (1944).

likewise statutory and was wholly unknown to the common law.[11] Accordingly, it is held that bills of exceptions will be allowed only upon strict compliance with statutory technicalities and requirements.[12] These requirements have been construed as jurisdictional,[13] and the court is powerless to substitute what may seem to be a rule of justice for the statutory technicalities.[14] In fact, the general rule that all phases of statutory appeal procedure must be strictly followed seems especially strict as applied to bills of exceptions.[15]

GENERAL BILLS

A. *Statutes.*

As previously observed, the subject matter under discussion is regulated and strictly limited by statute. There are several applicable and related statutes. One provides for a court reporter in certain cases, who is required to note the testimony and other proceedings on the trial, and dispenses with the necessity of a bill of exceptions as to those things, among others, duly noted by the reporter. It also provides that no bill of exceptions need be taken to the action of the court in overruling a motion for a new trial.[16] Another provides for giving notice to the reporter to transcribe his notes as a condition to perfecting an appeal.[17] Another, after providing certain things with reference to the reporter's notes, not material at this point, states that:

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[11]Williams v. Ramsey, 52 Miss. 851 (1876); Richmond v. Enochs, 109 Miss. 14, 67 So. 649 (1915), citing: Chenault v. Adams Machine Co., 97 Miss. 487, 52 So. 189 (1910); Albrecht v. State, 62 Miss. 516 (1885); Allen v. Levy, 59 Miss. 613 (1882); Vicksburg & M. R. R. v. Ragsdale, 51 Miss. 447 (1875); Van Buren v. State, 24 Miss. 512 (1852).

[12]McClanahan v. O'Donnell, 148 Miss. 478, 114 So. 336 (1927); Richmond v. Enochs, 109 Miss. 14, 67 So. 649 (1915).

[13]Bridges v. Clay Co., 57 Miss. 252 (1879), and cases cited throughout the article. However, it is suggested in some of the decisions that a failure to follow the statutory remedy may be excused where the failure is due to the "fraud or fault on the part of the opposing litigant to secure judgment or decree in his favor." Tobias Bag Co. v. Delta Cotton Oil Co., 193 Miss. 873, 11 So. (2d) 210 (1942). In such instances and where all necessary elements of the right are made to appear, equity may intervene to enjoin the execution of the judgment or decree so obtained. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE (1925) § 440.

[14]Richmond v. Enochs, 109 Miss. 14, 67 So. 649 (1915), overruling Mississippi Cent. R. R. v. Chambers, 103 Miss. 400, 60 So. 562 (1913).

[15]*Cf.* Sabougla Drainage Dist. No. 2. v. Peoples Bank and Trust Co., 191 Miss. 331, 1 So. (2d) 219 (1941); MISS. CODE ANN. (1930) §§ 26, 40, 2323.

[16]MISS. CODE ANN. (1942) § 1639: This statute provides that no party shall be required without his consent to go to trial in the circuit or chancery court unless the hearing is attended by a court reporter where the property or demands at issue amount to as much as fifty dollars. Where the reporter attends, exceptions to rulings are dispensed with. Otherwise, it should be noted that the practice of "taking exceptions" still prevails.

[17]*Id.* § 1640.

> "If the original or the copy of the court reporter's notes shall be lost or destroyed, or defaced in any manner, or if the court reporter should die, resign or be unable or otherwise should fail to transcribe his notes, and furnish a typewritten copy of his notes, sixty days additional time shall be allowed for the preparation of a bill of exceptions, or as the case may be, another copy of the transcribed notes. In case a copy of the transcribed notes cannot be furnished, a bill of exceptions may be prepared within the time stated, as in cases where no court reporter takes down the evidence. . . ."[18]

Other portions of the last mentioned section and other related statutes will be referred to under appropriate headings herein. At this point an attempt will be made to analyze the procedural steps as interpreted by the court.

B. *Notice to Reporter.*

The first requirement in perfecting the general bill is the statutory notice to the reporter to transcribe his notes as required by law.[19] A bill of exceptions will not be allowed and will be stricken on motion where it appears that the notice was not given.[20] Since the requirement here is jurisdictional, it would seem to follow that the notice must be given even in cases where it obviously could not serve to bring about the production of the notes, as where the notes had been previously destroyed. The court is powerless, in this connection as well as others, to substitute a rule of justice or reason for the statutory requirement.[21] Even if the reporter should die before the notice is given, the safe course is to mail the notice as though he were living.[22]

C. *Time for Presentment.*

The time for the approval of the bill by the trial judge is treated in another subdivision. Attention is here directed to the time within which the bill must be *presented*. Three statutes are involved.

By one section[23] the reporter is allowed sixty days within which to transcribe his notes, after approval of the appeal bond or after notice is given in cases where no bond is required. Another section[24] provides that the reporter may, for good cause, be granted an extension of time,

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[18] *Id.* § 1644.
[19] *Id.* § 1640.
[20] Stewart v. State, 179 Miss. 31, 174 So. 579 (1937); Richmond v. Enochs, 109 Miss. 14, 67 So. 649 (1915).
[21] *Ibid.*
[22] Miss. Code Ann. (1942) § 1640.
[23] *Ibid.*
[24] *Id.* § 1642.

not exceeding thirty days. Finally, a third section[25] provides that if the notes are not forthcoming, "sixty days additional time shall be allowed for the preparation of a bill of exceptions, or as the case may be, another copy of the transcribed notes."

A careful analysis of the statutes referred to in the light of applicable decisions demonstrates the following rules of thumb:

(1) The extent of time allowed the reporter for transcribing and filing his notes is sixty days, in the absence of an extension. This time begins to run either (a) from the approval of the appeal bond, or (b) from the *giving* of the notice to transcribe in cases where no appeal bond is required.

(2) An additional thirty days may be allowed by the court[26] upon application of the reporter for good cause shown,[27] *provided* the application is made before the expiration of the basic time limit.[28] A total of ninety days is therefore the limit of the law; so an order attempting further to extend the time is void.[29]

(3) Thereafter, there is allowed an additional sixty days within which the appellant must prepare and present to the trial judge a bill of exceptions. A bill presented after this time will be stricken on motion.[30] No application for leave to file the bill is necessary, but the "sixty days additional time" is automatically allowed.[31]

D. *Preparation of Bill.*

(1) Form and Content: No particular form is required, but it is customary to set forth the testimony of each witness in narrative form. The bill should contain the substance of the testimony.[32] It must, of necessity, contain the substance of objections and motions made on the trial and the court's rulings thereon.

Under the present statutes,[33] contrary to the original rule,[34] it is not necessary nor is it proper, to include in the bill the pleadings, exhibits,

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[25]*Id.* § 1644.

[26]Old Men's Home, Inc., v. Lee's Estate, 191 Miss. 669, 2 So. (2d) 791 (1941).

[27]Miss. Code Ann. (1942) § 1642. No decision has defined "good cause."

[28]*See* Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933).

[29]Allen v. Levy, 59 Miss. 613 (1882); Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933).

[30]State Highway Dept. v. Meador, 184 Miss. 381, 185 So. 816, 186 So. 642 (1939); Yazoo & M.V.R.R. v. Dampeer, 108 Miss. 451, 66 So. 814 (1914); Jones v. Williams, 62 Miss. 183 (1884); Allen v. Levy, 59 Miss. 613 (1882).

[31]Old Men's Home, Inc., v. Lee's Estate, 191 Miss. 669, 2 So. (2d) 791 (1941).

[32]Warren v. State, 165 Miss. 783, 144 So. 698 (1932).

[33]Miss. Code Ann. (1942) §§ 1637, 1639.

[34]Geigolt v. Joor, 60 Miss. 817 (1883).

instructions to the jury, verdict, judgment, motions or other matters of record which are properly a part of the clerk's transcript. However, the inclusion of these matters in the bill will have the same effect as if contained in the record apart from the bill and will not cause such matters to be disregarded.[35]

(2) Signature and Affidavit: There is no statutory provision requiring that the bill be sworn to or even signed by appellant or his counsel, except in instances where the trial judge declines to sign, but in one case the court indicated that the bill must be "sworn to by the litigating parties."[36] The safer and better practice is to have the bill signed and sworn to by appellant and his attorney.

(3) Signature and Certificate of Trial Judge: Since the trial judge must approve the bill, with certain exceptions, hereinafter noted, there should be a form of certificate attached for his signature. This certificate should contain a statement that the bill was presented to him for his approval upon a day certain and that it is approved as being correct. This certificate should contain all of the facts necessary to show that the bill was properly presented, since the recitals therein are conclusive on appeal in the absence of a showing of fraud.[37] Such recitals in the certificate, however, are not jurisdictional; and the presumption is that the judge acted lawfully in signing the bill.[38]

E. *Presentment of Bill.*

It is necessary that the bill be actually presented to the trial judge within the time limit. It is not sufficient merely that it be filed with the clerk.[39] The bill becomes a part of the record by signature of the judge.[40] While it is not necessary that it be marked filed,[41] it is the better practice to have the bill filed as in the case of the stenographer's transcript.[42]

F. *Notice of Hearing.*

The statutes do not expressly require, except in the case of amendments,[43] either notice of presenting the bill or notice of the hearing thereon; but the correct procedure is indicated in several decisions.

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[35]Miss. Code Ann. (1942) § 1969; Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582 (1920).
[36]Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933).
[37]Kimball v. Mitchell, 57 Miss. 632 (1880).
[38]Cato v. Crystal Ice Co., 108 Miss. 667, 67 So. 155 (1915).
[39]*Ibid.*
[40]Kimball v. Mitchell, 57 Miss. 632 (1880).
[41]*Ibid.*
[42]Miss. Code Ann. (1942) § 1644.
[43]*Id.* § 1535.

The appellant should prepare the bill "and present it to the . . . judge for approval, giving notice thereof to opposing counsel of the hearing before the judge."[44] The hearing may be had in vacation or even by a judge whose term has expired.[45]

The suggested and customary practice is to present the bill, as prepared by counsel for appellant, and secure from the judge a fiat reciting that the bill was presented for approval and directing the appellee to show cause upon a day fixed therein why the bill should not be approved and allowed. A copy of the bill with certified copy of the fiat attached should then be delivered to opposing counsel. Caution suggests that notice be served by the proper officer[46] upon appellee and upon opposing counsel.[47] No particular time is specified by statute or decision, but at least five days' notice should be given, as in the case of hearings upon an application to amend a bill.[48]

G. *Approval of Bill.*

(1) The Hearing: Upon the hearing, it is the duty of the judge to determine whether the bill is correct.[49] He may so determine from his personal recollection,[50] or he may take such proof as may be available to determine the correctness of the bill as presented and what the real facts are.[51] The bill may be corrected by the trial judge to state the true facts,[52] but the procedure must be by bill of exceptions. Appellant is not entitled to a rehearing on the merits of the case simply because of the difficulty in preparing a correct bill of exceptions.[53]

(2) Substitute for Judge's Approval: There can be no justification for the trial judge in failing to approve a general bill, provided the machinery for a hearing thereon is properly set in motion. Should he

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[44]*See* Warren v. State, 165 Miss. 783, 144 So. 698 (1932); *cf.* Allen v. Levy, 59 Miss. 613 (1882).

[45]Miss. Code Ann. (1942) § 1644.

[46]*Id.* §§ 1876, 8681.

[47]Warren v. State, 165 Miss. 783, 144 So. 698 (1932).

[48]Miss. Code Ann. (1942) § 1535.

[49]As said in Williams v. Ramsey, 52 Miss. 851 (1876): "The signing a bill of exceptions is a solemn official act, which should never be performed unless required by law. But when the law requires it, the judge should promptly and without delay discharge his duty." *Id.* at 857.

[50]Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933); Planters' Oil Mill v. Yazoo & M. V. R. R., 150 Miss. 813, 117 So. 242 (1928).

[51]*Ibid.*

[52]Miss. Code Ann. (1942) § 1644.

[53]Tobias Bag Co., Inc., v. Delta Cotton Oil Co., 193 Miss. 873, 11 So. (2d) 210 (1942); McClanahan v. O'Donnell, 148 Miss. 478, 114 So. 336 (1927). Query: Does the same rule apply where it is impossible to perfect the appeal through no fault of the party?

nevertheless fail or refuse to approve and sign the bill, the statutory alternatives must be resorted to.[54] There are two such alternatives.

(a) Signature of Disinterested Attorneys: If the trial judge fails or refuses to sign the bill, two attorneys at law, who were present at the time of the trial and of the refusal of the judge to sign, may sign the bill with the same effect.[55] By the terms of the statute, the attorneys must have been present both when the testimony was introduced and when the judge refused to sign.[56] Although broad enough to include attorneys for the litigants, it has been held that the attorneys must be disinterested.[57]

The difficulty of finding two disinterested attorneys, who can and will qualify under the rule is at once apparent, and unless the second alternative, next discussed, is available, the failure or refusal of the judge to sign the bill will result in defeating the appeal.

(b) Signature of Appellant's Attorneys: The statutes plainly provide that:[58]

> "If the death, resignation, or other incapacity of the judge shall prevent him from signing a bill of exceptions [or if he refuses to sign],[59] the affidavit of the attorney of record who represented the party tendering the bill of exceptions, and of all of them if more than one, that it correctly states the facts and rulings of the court, shall be received as a substitute for the signature of the judge to it."

The statute then proceeds to provide, in effect, that if appellee shall file an affidavit that the bill is incorrect, stating wherein it is incorrect, the Supreme Court shall consider the affidavits and make up the record.

In several decisions, the court sanctioned the procedure set forth in these statutes in its entirety;[60] but in none of these cases was a constitu-

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[54]There is a dictum in the case of Williams v. Ramsey, 52 Miss. 851 (1876), to the effect that the trial judge may " . . . *ex necessitate rei,* to prevent a failure of justice, be compelled by mandamus to sign. . ." a bill of exceptions. *Id.* at 858. However, it is clear that the judge not only may but must refuse to sign a bill as presented if incorrect. His duty is to sign such bill as made up and corrected after such hearing thereon as may be deemed necessary.

[55]Miss. Code Ann. (1942) § 1534. Although this section is specifically directed to special bills, under Section 1533, it has been treated as applying to general bills under Section 1644. The point of application has never been raised. It is also directed to instances where the judge "shall refuse" to sign, but no distinction seems to have been drawn between refusal and simple failure to sign.

[56]This feature seems to have been largely overlooked or disregarded: *cf.* Fairley v. State, 152 Miss. 656, 120 So. 747 (1929).

[57]Richardson v. State, 196 Miss. 560, 17 So. (2d) 214 (1944); Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933); Pittman v. State, 155 Miss. 745, 124 So. 761 (1929).

[58]Miss. Code Ann. (1942) § 1533, made a part of Section 1644 by reference.

[59]*Id.* § 1644.

[60]Miller v. Phipps, 161 Miss. 564, 133 So. 128 (1931); Sovereign Camp, W. O. W. v. Sloan, 135 Miss. 597, 99 So. 568, 101 So. 195 (1924).

tional question raised, nor were the several decisions holding that the court was without power to make records for the lower court noticed.[61] Finally, however, in *Geiselbreth v. Mississippi Power and Light Co.*, the court held the statute unconstitutional as an attempt to broaden the appellate powers of the court beyond the limits of section 146 of the constitution.[62] This decision justifies more than passing comment, because it is believed that it should be limited so as to strike down only the objectionable features of the procedure pointed out in the opinion.[63]

The *Geiselbreth* decision was based upon a motion by appellee to strike the bill because the law was not complied with in regard to making bills of exceptions. The court, referring to the rule that the Supreme Court cannot perfect a record for the court below, remarked that it

> ". . . follows necessarily that the . . . bill of exceptions not being signed and approved by the trial judge, and not being approved by two disinterested attorneys under section 590, Code 1930 [Section 1534, Code 1942], cannot be considered in this court. The statute does not contemplate that attorneys for one litigant alone can make a record of the proceedings in his case."[64]

Giving the decision the broadest interpretation of which the language used is susceptible, it is authority for the proposition that in no event has the appellate court power to consider a bill unless signed by the judge or two disinterested attorneys under the prescribed circumstances. However, there would seem to be no objection to the court's reception of a bill authenticated as prescribed in the condemned statute, provided no showing is made by opposing counsel that the bill is incorrect or incomplete in

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[61]Pittman v. State, 155 Miss. 745, 124 So. 761 (1929); State v. White, 153 Miss. 73, 120 So. 820 (1929); Ocean Springs Bank v. Frederick, 154 Miss. 554, 110 So. 367 (1926); Robertson v. Southern Bitulithic Co., 129 Miss. 453, 92 So. 580 (1922); Brooks v. Gentry, 106 Miss. 506, 64 So. 214 (1914); Dana v. Gulf & S. I. R. R., 106 Miss. 497, 64 So. 214 (1914).

[62]166 Miss. 749, 147 So. 874 (1933). See note 63, *infra.*

[63]In Max N. Tobias Bag Co., Inc. v. Delta Cotton Oil Co., 193 Miss. 873, 11 So. (2d) 210 (1942), it appeared that the bag company had filed a suit in the circuit court against the oil company, which resulted in a judgment for the oil company. The notice was given the reporter and an appeal bond was executed by the bag company. The reporter died before transcribing his notes. The circuit judge died without having signed a bill of exceptions. No other steps were taken to perfect the record, but the bag company filed its bill in chancery to set aside the judgment and to recover a judgment against the oil company, to which bill a demurrer was interposed and sustained.

In the course of the opinion affirming the case, the Court, in demonstrating that the failure to perfect the appeal was due to the mistake of appellant and not to fraud or procurement of appellee, observed that: "There was still left to the bag company the right to a bill of exceptions prepared and sworn to by its attorney as authorized by Section 589 [Section 1533, Code 1942]." There followed a full quotation of the statute. However, there is no indication that the court considered a constitutional question, or the *Geiselbreth* case, cited note 62, *supra.* Also, the Court's language in approving the statutory procedure was probably dictum.

[64]166 Miss. at 758, 147 So. at 876.

some substantial and material particular. A similar procedure has long been approved under similar statutes.[65]

There can be no constitutional objection to the requirement that appellee demonstrate, as a condition to striking the bill, that it is incorrect in some substantial particular,[66] since this does not involve the making of a record; and if the procedure involves to some extent an issue of fact, the Supreme Court is given jurisdiction thereover.[67] The only objectionable feature of the statute is the procedure undertaking to vest in the Supreme Court jurisdiction to correct or make up the record, and it should otherwise be allowed to prevail.[68]

(3) Time for Approval by Judge: As previously observed, the bill must be "presented" to the trial judge within a time limited by statute, but there is no statutory time limit within which the general bill must be approved or signed.[69] Therefore, it is held that the bill may be approved and signed after the time limited for presentment.[70] It may be approved and signed in vacation or by the trial judge after his term of office expires.

(4) Exclusiveness of Procedure: In instances where bills are proper, the method prescribed by statute for perfecting and amending the same is exclusive. Thus, omissions in the record may not be supplied by the

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[65]Miss. Code Ann. (1942) § 1643, under which no transcript of the evidence may be stricken unless shown to be incorrect in some material particular. See Robinson v. McKnight, 133 Miss. 501, 97 So. 811 (1923); Phillips v. Canon, 129 Miss. 656, 92 So. 557 (1922); J. J. Newman Lbr. Co. v. Lucas, 108 Miss. 784, 67 So. 216 (1915); Ruffin v. Page, 109 Miss. 12, 67 So. 648 (1914).

[66]This may be accomplished by a denial under oath that the bill is correct as presented, pointing out the particulars in order that the court may judge the materiality of the omissions or errors ruled upon. As stated in Miller v. Phipps, 161 Miss. 564, 133 So. 128 (1931): "In the absence of a denial under oath that the bill of exceptions is correct, we treat same as though it had been agreed to be correct by counsel. The record is not so challenged, and therefore the question of whether or not it is correct is not here presented for decision." *Id.* at 571, 133 So. at 128. And in Planters' Oil Mill v. Yazoo & M. V. R. R., 119 So. 168 (Miss. 1928), it was said that, "It is competent for counsel to agree on a bill of exceptions and to waive the time of perfecting the same." Although the statement of the court in this case that counsel might waive the time would seem opposed to the view that the statutory procedural requirements are jurisdictional, there appears to be no objection to counsel agreeing upon the bill itself.

[67]Miss. Code Ann. (1942) § 1960; McInnis v. Simmons, 162 Miss. 606, 139 So. 872 (1932); *cf.* Code Section 1643.

[68]See Miller v. Phipps, 161 Miss. 564, 133 So. 128 (1931), holding that in the absence of a denial under oath that the bill is correct, it is treated as being agreed to by opposing counsel and motion to strike will accordingly be overruled. Also: Stewart v. State, 179 Miss. 31, 174 So. 579 (1937), referring to *Miller v. Phipps.*

[69]Miss. Code Ann. (1942) § 1644. Otherwise in case of special bills under Sections 1533 and 1534.

[70]Cato v. Crystal Ice Co., 108 Miss. 667, 67 So. 155 (1915); McGee v. Beall, 63 Miss. 455 (1886); Allen v. Levy, 59 Miss. 613 (1882) (where attorney for appellee was responsible for delay); *cf.* Dreyfus v. Cage, 62 Miss. 605 (1885).

ex parte affidavit of the trial judge,[71] or by his memorandum,[72] or certificate,[73] or by affidavits of counsel or others.[74]

H. *Power of Supreme Court in Making Record.*

It has been repeatedly held that the Supreme Court will not, and in fact cannot, make records or lend its aid in this respect, nor can it correct errors appearing in the record. Thus, it has no power to coerce officers of the lower courts in the duties owed to those courts or compel stenographers to transcribe or file their notes.[75] It cannot correct instructions or errors on affidavits of the trial judge or others.[76] It cannot entertain bills of exceptions upon controverted affidavits of counsel.[77] However, it is held that the Supreme Court may, on proper showing, stay the proceedings in order that the record may be corrected or perfected in the court below.[78] It may also try and determine issues of fact which arise out of any appeal[79] and which may be necessary to a disposition of the appeal,[80] such as facts showing the appeal has become moot,[81] and facts showing that the cause has been settled or that appellant's interest in the case has been transferred to appellee.[82] It is also settled that the Supreme Court may compel the filing of the record or any omitted parts which may be on file with the clerk of the lower court.[83]

I. *Amendments.*

The procedure for amending the bill of exceptions is prescribed by statute.[84] This statute provides that: "Bills of exception, with the approval

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[71]Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929).

[72]Helm v. State, 66 Miss. 537, 6 So. 322 (1889).

[73]Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929); *cf.* Humphrey v. Crowcow Hdw. Co., 163 Miss. 490, 140 So. 690 (1932), and cases cited therein.

[74]Benjamin v. Virginia-Carolina Chem. Co., 126 Miss. 57, 87 So. 895 (1920).

[75]Williams v. State, 178 Miss. 694, 172 So. 746 (1937); Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933); Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929); Pittman v. State, 155 Miss. 745, 124 So. 761 (1929); Planters' Oil Mill v. Yazoo & M. V. R. R., 150 Miss. 813, 117 So. 242 (1928); Ocean Springs Bank v. Frederick, 145 Miss. 553, 110 So. 366 (1926); Bankston v. City of Clarksdale, 134 Miss. 721, 99 So. 266 (1923); Brooks v. Gentry, 106 Miss. 506, 64 So. 214 (1914).

Statutes undertaking to confer such authority are unconstitutional. State v. White, 153 Miss. 697, 119 So. 807 (1928); Robertson v. Southern Bitulithic Co., 129 Miss. 453, 92 So. 580 (1922).

[76]Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929).

[77]See pt. G (2) (b), *supra.*

[78]Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929).

[79]See Hopper v. Hopper, 183 Miss. 621, 183 So. 504 (1938), wherein it was held that the Supreme Court had jurisdiction to allow alimony *pendente lite* in a divorce case and determine factual issues pertaining thereto upon affidavits.

[80]Miss. Code Ann. (1942) § 1960.

[81]State *ex rel.* Whall v. Saenger Theatres Corp., 190 Miss. 391, 200 So. 442 (1941).

[82]McInnis v. Simmons, 162 Miss. 606, 139 So. 872 (1932).

[83]See pt. G, *supra.*

[84]Miss. Code Ann. (1942) § 1535.

of the trial judge,[85] may be amended at any time before the hearing on appeal,[86] for the purpose of curing omissions,[87] defects, or inaccuracy; but no such amendment shall be made until the parties interested shall have been given five days' notice of such proposed amendment."[88]

J. Certiorari.

It is not the purpose of this article to enter into an extended or exhaustive treatment of the writ of certiorari, but the writ is here discussed only as it has a bearing on bills of exceptions.[89]

The writ lies to compel the clerk to perform his duty of filing the record and all appropriate parts thereof with the Supreme Court. The issuance of the writ does not amount to aiding the litigants or lower court in making the record, since all pertinent documents filed with the clerk of the lower court are parts of the record on appeal.[90] The duty of the clerk to file and certify the record is a duty owed to the Supreme Court.[91]

Upon "seasonable application"[92] on the first return day or within a reasonable time thereafter,[93] appellant may be entitled to a writ of certiorari directing the clerk of the lower court to perform his duty in filing and certifying the record on appeal.[94]

The application for the writ should show that the record or the omitted parts thereof are on file with the clerk of the lower court.[95] It should show that the omitted portions are properly a part of the record.[96] It is necessary that the motion disclose with particularity just what

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[85]Approval by the judge is indispensable and an order declining to allow an amendment is conclusive and cannot be made the subject of review. Ladnier v. Ingram Day Lbr. Co., 122 Miss. 577, 84 So. 385 (1919).

[86]On proper showing, proceedings may be stayed in the Supreme Court in order to allow further time to perfect or amend in the lower court a bill of exceptions. Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929).

[87]Where omitted parts of the record are shown to be on file with the clerk of the lower court, they may be brought up on certiorari.

[88]*Ex parte* amendments will be stricken. Brown v. Sutton, 158 Miss. 73, 120 So. 820 (1929); Helm v. State, 66 Miss. 537, 6 So. 322 (1889).

[89]Miss. Code Ann. (1942) § 1958.

[90]Gulf Coast Stevedoring Co. v. Gibbs, 124 Miss. 188, 86 So. 582 (1920).

[91]See Grand Court of Calanthe v. Baskin, 108 Miss. 752, 67 So. 210 (1915).

[92]Warren v. State, 165 Miss. 783, 144 So. 698 (1932); J. J. Newman Lbr. Co. v. Lucas, 108 Miss. 784, 67 So. 216 (1915).

[93]Miller v. Phipps, 152 Miss. 437, 119 So. 170 (1928).

[94]*Ibid.*

[95]Bankston v. City of Clarksdale, 134 Miss. 721, 99 So. 266 (1924); *cf.* Redmond v. Hilliard, 190 Miss. 839, 199 So. 83 (1940).

[96]*Ibid.*; Brasswell v. Board of Supervisors, 183 So. 278 (Miss. 1938); Williams v. State, 178 Miss. 694, 172 So. 746 (1936); Yazoo & M. V. R. R. v. Levy & Sons, 141 Miss. 196, 106 So. 524 (1925).

portions of the record, properly a part thereof, have been omitted in order that the court may determine the questions presented. If the proper showing is made, it is neither necessary nor proper that the case be remanded to perfect the record.[97]

SPECIAL BILLS

A. *Statutes.*

Special bills of exceptions, like general bills, are strictly governed by statutes. Statutes prescribe the instances where the bill is available,[98] the time within which it must be presented,[99] the methods of authentication by signature of the judge[100] or two attorneys,[101] the procedure when the bill is directed to rulings on motions for new trials,[102] and the amendment of the bill after it has become a part of the record.[103] These statutes are hereinafter considered in some detail.

There are certain statutory provisions which are exclusively applicable to general bills of exceptions, such as those pertaining to the requirement of the attendance of a court reporter whose notes become unavailable and those pertaining to the time for presenting the bill. Otherwise, the general bill is perfected "as in cases where no court reporter takes down the evidence."[104] Therefore, what has been said of general bills may be treated as equally applicable to special bills, except where differences in procedure are especially noted.

B. *Where Special Bill Is Available.*

The general statute provides as follows:[105]

> "If, on the trial of any cause in the circuit court, either party shall be aggrieved by any charge or decision of the court, such party may tender to the judge giving such charge or decision, a bill of exceptions stating therein the matters of law wherein he is supposed to have erred, and the judge shall be bound to sign the same; and the bill of exceptions so signed shall be made and considered a part of the record in the cause; and in case the judge shall refuse to sign a bill of exceptions so tendered, if the facts therein be true as stated, he shall be guilty of a misdemeanor in office."

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[97]Brasswell v. Board of Supervisors, 183 So. 278 (Miss. 1938).
[98]Miss. Code Ann. (1942) §§ 1531, 1639.
[99]*Id.* § 1533.
[100]*Ibid.*
[101]*Id.* § 1534.
[102]*Id.* § 1537.
[103]*Id.* § 1535.
[104]*Id.* § 1644.
[105]*Id.* § 1531.

Another statute[106] enacted many years after the act above quoted, provided for a court reporter in all civil and criminal cases and in matters of probate and special proceedings, wherein property or demands of as much as fifty dollars may be in issue, and provided that no party shall be required without his consent to go to trial unless the case is attended by a court reporter.[107]

The object of the bill is to put of record matters which transpire on the trial and which are not of record proper.[108] All matters appearing in the reporter's transcript are properly of record and should form no part of a special bill of exceptions. If a reporter attends and takes the entire proceedings but a transcript cannot be furnished or obtained due to failure in some respect of the reporter, the general bill may be resorted to.[109] On the other hand, if no reporter attends the trial or if some part of the testimony is given in the absence of the reporter, the special bill is the exclusive method of making the record,[110] as to such part of the proceedings not taken by the reporter. It is conceivable that both types of bills will appear in the same case, as where a reporter attends but fails to take some part of the proceedings and thereafter defaults in providing the transcript of his notes of the part taken.

C. *Procedural Requirements.*

(1) Taking Exception: The first requirement for perfecting the special bill is the noting of an exception to some ruling of the court or other matter to which objection is made. The practice of "taking exceptions" is dispensed with only where the objection is noted by the reporter. Therefore, the bill should recite that the complaining party duly excepted to the ruling complained of.[111]

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[106]*Id.* § 1639.

[107]With reference to exceptions and bills of exceptions, this statute further provided as follows:

> ". . . Exceptions and bills of exception shall be necessary only when it is desired to reserve exceptions to some ruling or decision of the court which would not otherwise appear of record. No bill of exceptions need be taken to the action of the court in overruling a motion for a new trial. In all cases tried either in the circuit or chancery court in which the evidence is taken down by an official court reporter, all pleadings and all papers filed or introduced in the case, all orders of the court entered on the minutes, all instructions and a copy of the court reporter's notes shall constitute the record and no bill of exceptions shall be necessary in order to make any of the above matters part of the record."

[108]Miss. Code Ann. (1942) § 1639; Vicksburg & M. R. R. v. Ragsdale, 51 Miss. 447 (1875).

[109]See pt. B, *Where Special Bill Is Available, supra.*

[110]Benjamin v. Virginia-Carolina Chem. Co., 126 Miss. 57, 87 So. 895 (1920).

[111]Exceptions to the rulings of the court were never required or recognized in chancery. In the law court they were considered necessary, before the advent of the court reporter, in order to "charge the judge's mind." Nicholson v. Bankers' & Shippers' Ins. Co., 164 Miss. 523, 145 So. 349 (1932).

(2) Time for Presentment and Signing:

Exceptions During Trial: A bill of exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and signed during the trial or during the term of court.[112] There is no provision in such cases for extending the time for either tendering the bill to the court or getting it signed. It follows that a bill tendered but not signed during the term is void.[113]

Exceptions on Motion for New Trial: In the case of bills of exceptions taken on motions for a new trial, these must be presented to the judge for his signature during the term or within ten days thereafter, or within such further time from the end of the term, not exceeding sixty days, as the court may allow.[114] The statutes do not prescribe the time within which applications for an extension of time must be made, but the rule of strict construction would seem to require that application be made and the extension authorized prior to the expiration of ten days from the end of the term.[115] The time may not be extended beyond sixty days from the end of the term.[116]

As in the case of general bills, the statute does not fix any time within which the judge must sign the bill, except that the bill ". . . must be signed promptly by him if found to be correct."[117] By analogy, it may be stated, therefore, that the bill may be approved and signed after the time limited for presentment.[118]

(3) Procedure in Common with General Bills: What has been said in the discussion of general bills with reference to the construction of statutes, signature and certificate of the judge, presentment of the bill, except as to time, substitute for judge's approval,[119] exclusiveness of procedure, power of Supreme Court in making record, amendments, and certiorari, applies equally to special bills.

No statutory requirement covers the matter of notice to opposing counsel or the litigating parties, but, as in the case of general bills, notice

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[112]MISS. CODE ANN. (1942) § 1533.

[113]State Highway Dept. v. Meador, 184 Miss. 381, 185 So. 816 (1938); Yazoo & M. V. R. R. v. Dampeer, 108 Miss. 451, 66 So. 814 (1914); Jones v. Williams, 62 Miss. 183 (1884); Allen v. Levy, 59 Miss. 613 (1882).

[114]MISS. CODE ANN. (1942) §§ 1533, 1537.

[115]See, for example, Geiselbreth v. Mississippi P. & L. Co., 166 Miss. 749, 147 So. 874 (1933).

[116]See note 113, *supra.*

[117]MISS. CODE ANN. (1942) § 1533.

[118]See note 70, *supra.*

[119]The only difference to be here noted lies in the fact that the authority granted by statute for the appellant's attorney to substitute his affidavit for the judge's approval does not apply where the judge "refuses" to sign a special bill; *cf.* MISS. CODE ANN. (1942) §§ 1533, 1644.

ought to be given, if only informally, so as to afford opposing counsel the opportunity to be heard. However, the courts may be depended upon to insist upon such notice and no formal service or evidence thereof would seem to be required.

Contrary to the prevailing rule applicable to general bills that they be "sworn to by the litigating parties," it is not customary for counsel or litigants either to sign or swear to special bills. This may be accounted for by the fact the special bill is usually brief and taken during the trial while the contents are fresh in the court's memory. A different practice, more akin to that applying to general bills, would be suggested where, for example, the entire testimony of a witness or the entire proceedings on motion for a new trial are involved.

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STOKES V. ROBERTSON, JR., OF JACKSON.....SECOND VICE-PRESIDENT
LOTTIE KUYKENDALL OF JACKSON.....SECRETARY-TREASURER

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R. W. Thompson, Jr.....Gulfport
Phil Stone.....Oxford
Robert D. Everitt.....Ruleville
John Clark Love.....Kosciusko
S. B. Laub.....Natchez
Fulton Thompson.....Jackson
Dees Stribling.....Philadelphia
J. D. Thames.....Vicksburg
C. D. Shields.....Meridian
W. W. Venable.....Clarksdale
J. Kearney Travis.....Hattiesburg
R. C. Russell.....Magee
John T. Armstrong.....Hazlehurst
Grayson B. Keaton.....Picayune
J. E. Caradine.....West Point
J. H. Caldwell.....Charleston

NOTE

Recording of Instruments Affecting Land in Mississippi

England had no general registration system to be inherited by the colonies. The earliest known recording statutes were adopted to provide registration in two or three counties or parts of counties.[1] They were then, and are now, styled as an act to prevent fraud and not to impart notice.

The United States has added materially to its inherited recording system. The essential plan of the system is substantially the same in every state, with some variation in the details. Most state statutes embody language merely authorizing a registration of certain instruments. The remaining states, including Mississippi, have adopted statutes not permissive, but mandatory.[2] The effects of the narrow English interpretation were felt very strongly in the early Mississippi decisions. The reluctance in early cases to impart constructive notice reflects the English interpretation and purposes of recording statutes.[3]

Scope and Operation

The Mississippi recording acts enumerate the types of instruments which come within their scope and operation by virtue of the statutes.[4] It is not every legal and equitable right that comes within the purview of the recording acts. For example, equities arising by operation of law are incapable of being recorded as such, and are not required to be recorded.[5]

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[1] 2 & 3 Anne, c. 4 (1704); 7 Anne, c. 120 (1709); 8 Geo. II, c. 6 (1735).

[2] Miss. Code Ann. (1942) §§ 857, 867, 868.

"All conveyances of land, and all express trusts therein declared are by our statutes required to be by deed or writing, acknowledged or proved, and lodged with the clerk . . . for record." Nugent v. Priebatsch, 61 Miss. 402, 406 (1883). See also Mangold v. Barlow, 61 Miss. 593 (1884); Tinnin v. Brown, 98 Miss. 378, 53 So. 780 (1910).

[3] Kelly v. Mills, 41 Miss. 267 (1866); Walker v. Gilbert, 1 Freem. Ch. 75 (Miss. 1843).

[4] Section 856 provides for registration of "A written instrument of or concerning the sale of land, whether the same be made for passing an estate of freehold or inheritance, or for a term of years, or for any other purpose, except in cases specially provided for by law, . . ." Section 862 provides for recording of ". . . title bond or other written contract in relation to land. . . ." [Section includes power of attorney to sell land. Hughes v. Wilkinson, 37 Miss. 482 (1859)]. Section 863 provides: "Every writing respecting the title to personal property which by law ought to be recorded, . . ." Section 864 includes "A covenant or agreement made in consideration of marriage, . . ." Section 868 provides for recording of "All bargains and sales, and all other conveyances whatsoever of lands, whether made for passing an estate of freehold or inheritance, or for a term of years; and all instruments of settlement upon marriage wherein land, money, or other personalty should be settled or covenanted to be left or paid at the death of the party, or otherwise; and all deeds of trust and mortgages whatsoever, . . ."

[5] Binder v. Weinberg, 94 Miss. 817, 48 So. 1013 (1909); Atkinson v. Greaves, 70 Miss. 42, 11 So. 668 (1892); Greaves v. Atkinson, 68 Miss. 598, 10 So. 73 (1891); Lissa v. Posey, 64 Miss. 352, 1 So. 500 (1886); Nugent v. Priebatsch, 61 Miss. 402 (1883).

The limitation to the scope of our registry acts is expressed in *Lissa v. Posey*:[6]

> "The registry laws protect creditors and subsequent purchasers alike, but only as against the unrecorded instruments named by such statutes. They do not apply or afford protection to creditors or subsequent purchasers against equities which arise by operation of law and which are incapable of being recorded, or which are not required by law to be recorded."

Implied trusts, liens and rights of reformation constitute the more important of the rights which arise by operation of law. A resulting trust arises by implication of law and does not grow out of a contract. Constructive trusts are implied by equity for the purpose of working out right and justice in regard to property which has been acquired by fraud. These fall into the overall classification of implied trusts. Generally no implied trust is effectual to defeat or impair the title of a bona fide purchaser of land, but a court of equity can follow the real owner's property, and reserve its real ownership, into whatever form it may be changed or transmitted, even into the hands of third parties, so long as the property can be traced, until it goes into the hands of an innocent purchaser for value and without notice.[7] The consideration then becomes, "What creditors and purchasers are classed as innocent, and without notice?" Passing up the question of actual notice for a moment, the effects of the recording acts upon the rights and relationship of the *cestui que trust* and purchasers or judgment creditors, are the primary consideration. The effects of the recording statute (applicable equally to purchasers and judgment creditors alike)[8] was discussed by the court in *Nugent and Co. v. Priebatsch*:[9]

> "A purchaser under a judgment against the trustee of property, in which there is a trust arising by operation of law, does not acquire the right of a beneficiary because he is not a purchaser for value. Nor, since such trusts are not required to be recorded is the creditor in the judgment entitled to subject the property by virtue of the registry act. . . ."

The holder of the trust rights, in other words, is not required to record these rights. As long as the rights are merely in the form of an unwritten implication of law, the record purchaser or creditor cannot say that the

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[6]64 Miss. 352, 355, 1 So. 500, 501 (1886).

[7]Bank of Hickory v. McPherson, 102 Miss. 852, 59 So. 934 (1912); Binder v. Weinberg, 94 Miss. 817, 48 So. 1013 (1909); Wood v. Stafford, 50 Miss. 370 (1874); McLeod v. First National Bank, 42 Miss. 99 (1868).

[8]Originally judgment creditors and subsequent purchasers for value were not treated as having equal rights. Later the acts were amended so that improperly executed instruments are void in regard to both.

[9]61 Miss. 402 (1883).

rights are void as to subsequent purchases by virtue of the registry statutes. The alternative is expressed by the court,[10]

> ". . . but where . . . [he] makes a declaration of trust in the land. . . and it is not acknowledged and recorded in the manner prescribed by law, it is void as to creditors (and purchasers), who not having notice, have reduced their demands to judgment, and a purchaser under such judgement is protected, not because he is a *bona fide* purchaser, but because the declaration of trust is void as against the creditor."

In brief, the attitude seems to be that equities arising by operation of law are not subject to the provisions of the recording statutes and as such, are governed by doctrines of common law and statutes dealing with transfer of ordinary rights and properties, not covered by the registry acts. If, on the other hand, the holder of the equities undertakes to reduce the interest to the form of a written instrument, a written encumbrance upon the property, the instrument is then subject to both the benefits and prohibitions of the recording acts. The one advantage in voluntarily placing the equitable rights within the purview of the registry acts is that of imparting constructive notice, and by so doing, to prevent the equities from being "cut off" by subsequent purchasers without actual notice and by judgment creditors. While the record of the trust declaration will impart the desired notice, the same care in execution, acknowledgment and filing for record, is required as is of any instrument named in the recording acts.[11]

Requisites of the Instrument

Acknowledgment

The record does not operate as constructive notice unless the instrument is duly executed and properly acknowledged or proved, so as to entitle it to be recorded.[12] Section 856, Code of 1942, states:

> "A written instrument of or concerning the sale of lands. . . or any writing conveying a personal estate, shall not be admitted to record. . .unless the execution thereof be first acknowledged . . . and any such instrument which is admitted to record without such acknowledgment or proof shall not be notice to creditors or subsequent purchasers for a valuable consideration."

Pursuant to the act, a line of very early cases in this state held that the recorded instrument containing a faulty acknowledgment on its face was

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[10] *Ibid.*

[11] 2 POMEROY, EQUITY (5th ed. 1941) § 646. See also Nugent v. Priebatsch, 61 Miss. 402 (1883).

[12] Bassett v. Building & Loan Ass'n, 164 Miss. 674, 145 So. 109 (1933); Griffis v. Martin Oil Co., 127 Miss. 606, 90 So. 324 (1921); MISS. CODE ANN. (1942) §§ 867, 868; 2 POMEROY, EQUITY (5th ed. 1941) § 652.

not constructive notice to subsequent purchasers and judgment creditors and would not affect their rights as such.[13] In 1894 the Mississippi Supreme Court, in the case of *Woods v. Garnett*,[14] upheld the grantee under an improperly acknowledged conveyance as against a subsequent purchaser for value. The basis for the decision was thus expressed by Judge Cooper:[15]

> ". . . [T]he registry acts require actual knowledge of the unrecorded conveyance. One who sees upon the record, and reads an instrument improperly recorded, . . . cannot claim to be a bona fide purchaser of property therein described."

There was little or no chance that the purchaser could have had actual knowledge of the original instrument. The court indicated very strongly that a purchaser who sees upon the record an instrument which is not properly acknowledged, one which does not impart *constructive* notice because of the statute, is charged with *actual* notice by the very fact that he has seen the record of the instrument and obtained actual knowledge therefrom. An improperly acknowledged instrument then, being void against only those purchasers and creditors without actual notice, would not be invalidated by the statute if it can be shown that he actually saw the enrolled instrument. The statute provides that the improperly acknowldeged instrument does not impart constructive notice and is void as against purchasers and judgment creditors without actual notice.[16]

A great many cases have been decided in the state in which there has been a complete lack of actual notice, either in the form of notice of the original instrument or of actual notice obtained by inspection of the improperly acknowledged enrolled instrument.[17] The result has been that in cases of improperly acknowledged instruments where neither actual notice of the original instrument nor actual knowledge of the existence of the enrolled instrument from an inspection of the records exists, the recording statutes cannot supply constructive notice as the substitute for the absent actual notice. The section which avoids improperly acknowledged instruments neither takes from nor adds to this rule. In declaring improperly acknowledged instruments "void," it presupposes lack of notice.

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[13]Bass v. Estill, 50 Miss. 300 (1874); Work v. Harper, 24 Miss. 517 (1852); Thomas v. Grand Gulf Bank, 9 Smedes & M. 201 (Miss. 1848).

[14]72 Miss. 78, 16 So. 390 (1894).

[15]*Id.* at 84, 16 So. at 391.

[16]Sections 856 and 867 of the Code provide that an instrument shall not be notice and shall not be good against purchasers and judgment creditors unless it is acknowledged or proved and lodged with the clerk.

[17]Tinnin v. Brown, 98 Miss. 378, 53 So. 780 (1910); Wasson v. Conners, 54 Miss. 351 (1877).

Description of Property

Notice, imparted by the recorded instrument, necessarily relates to the specific rights and property therein described or referred to. Mistakes as to the description of property often arise to mislead those who actually inspect, and those who are constructively deemed to have inspected, the record. The greater weight of authority holds to the doctrine that one searching the record and finding, or one who by a search could have found, the record of an instrument which has been so drawn and executed that a reasonably correct description of the property is not given, is not charged with notice.[18] The test of sufficiency in description is qualified in Mississippi.

The qualification is expressed in *Dead River Fishing Club v. Stovall*:[19]

> "A description is sufficient against a third person if, by inquiry suggested by the instrument, they can describe the property."

This test of sufficiency in description is followed in many American jurisdictions and the inquiry suggested by the state of the record becomes a duty to those charged with constructive notice of the record by statute as well as those having actual knowledge of the record by an inspection.[20]

Parties

A grantee, mortgagee or judgment creditor is charged with notice of only those instruments which deal with the property in which he is interested or the persons with whom he is dealing. It is therefore important, not only that the property is accurately described, but also that the parties to an instrument are correctly named. A purchaser is not charged with notice where the instrument does not accurately name the parties thereto.[21]

Defects in Recording

The Mississippi recording statutes contain provisions to the effect that the recording is deemed to be complete and to become operative the

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[18]"The language, both of the instrument and of the record of it, must be such that if a subsequent purchaser should examine . . . he would obtain thereby an actual notice of all the rights which were intended to be created or conferred thereby." Bright v. Buckman, 39 Fed. 243, 247 (C. C. D. Fla. 1889); 45 Am. Jur. 485. See also 41 C. J. 500. For a discussion of mistakes by the recording officer, see 5 Tiffany, Real Property (3d ed. 1939) § 1273.

[19]147 Miss. 385, 395, 113 So. 336, 337 (1927).

[20]2 Pomeroy, Equity (5th ed. 1941) § 654b.

[21]Allen West Comm. Co. v. Millstead, 92 Miss. 837, 46 So. 256 (1908).

moment the instrument is left with the proper officer for recording.[22] Thus it has been decided by the courts that no subsequent error or omission of the officers whose duty it is to make the record will destroy the effect of constructive notice, once the instrument is properly executed, acknowledged and lodged for record in the proper county. This view is often referred to as the doctrine of *Mangold v. Barlow*.[23] In this case a valid instrument, containing an accurate description, was properly acknowledged and lodged with the clerk for recording. An error in transcription caused the description in the recorded instrument to embrace an entirely different parcel of land from that conveyed in the original deed. A subsequent purchaser searched the record, found the title to the property in question clear, and bought the property without any knowledge of the prior instrument.

In upholding the grantee under the prior instrument as against the subsequent purchaser, the court stated the hardship to the purchaser but followed the dictates of the statutes. The question was expressed by Judge Campbell, "And if a mistake is made in recording by which a subsequent grantee is misled and injured, whose claim shall prevail, that of the first grantee, who relied on the officer to do his duty, or the second grantee who, in the faith that the record is true, acts upon it?"[24] The grantee's valid instrument became notice to the world the day and hour that it was lodged with the clerk. Notice was given by operation of the statute before the error in transcription was made, a notice which was not based on the condition of proper transcription.

It is important that a clear distinction be drawn between the doctrine of *Mangold v. Barlow*[25] and the cases in which error in description arises from the original instrument.[26] A comparison of the decisions indicates that the original must prevail over the recorded instrument, in the cases where the original instrument conflicts with the record. It would seem that an attorney's abstract certificate should provide, in effect, that the purchaser has either a paramount title to the property, or a right of action against the clerk and his bondsmen.

Indexing

The Mississippi recording statutes provide that recorded instruments

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[22]The statute requires instruments to be acknowledged and filed with the clerk, and further provides that the time of filing shall constitute time of conveyance. MISS. CODE ANN. (1942) § 867 provides, in substance, that the time of filing constitutes the time of conveyance. "Ordinarily the filing or depositing, . . . in the proper office is sufficient although the recorder . . . makes mistakes in transcribing it." 41 C. J. 500.

[23]61 Miss. 593 (1884).

[24]*Id.* at 596.

[25]*Id.* at 593.

[26]Dead River Fishing Club v. Stovall, 147 Miss. 385, 113 So. 336 (1927).

shall be indexed, both direct and reverse.[27] In the absence of statutory provision, a failure to index or a mistake in indexing does not affect the record as notice.[28] Although never having been decided in Mississippi, the rule has been followed in jurisdictions with statutes similar to our own.[29] Duties and statutory requirements are fulfilled when the instrument is lodged with the clerk for recording. By the same token, a mistake in indexing after it is so lodged with the clerk, and after the operation of notice has begun, will not stop the operation of the statute.[30] Although sectional indices, often referred to as "abstract books," are kept in many Mississippi counties, these, presumably, are not a part of the official record since they are not required to be kept.

Where Recorded

The policy of the recording acts is that the persons upon whom constructive notice is imposed should be able to obtain an actual notice by means of a search. For this reason the operation of a record as constructive notice is limited territorially. A record is not notice with respect to any land situated in a different county from that in which the registration is made.[31] The probate records of a will, however, have been held to constitute notice throughout the entire state without necessity of recording the proceedings in the county where the land is situated.[32]

Chain of Title

It is not every purchaser who comes within the purview of the statutory notice. Records are indexed and arranged in such a way that conveyance follows conveyance according to grantors and grantees so that a "chain" of title can be traced by one searching the record. A purchaser would not ordinarily see the necessity or be required to look for conveyances unrelated to the chain of title from his grantee back to the original patent. The view was expressed in *Hart v. Gardner*:[33]

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[27]Miss. Code Ann. (1942) § 878. The term "direct and reverse" denotes indices by name of grantor and again by name of grantee.

[28]"In several jurisdictions an index, although required by statute, is held to be no part of the record and intended only to furnish facilities for tracing title." Note (1929) 63 A. L. R. 1057, 1058. See also 5 Tiffany, Real Property (3d ed. 1939) § 1274.

[29]Jones v. Folks, 149 Va. 140, 140 S. E. 126 (1927); Scott v. Thomas, 211 Ala. 240, 100 So. 778 (1924).

[30]For discussion of what constitutes "filing," see Meridian National Bank v. Hoyt, 74 Miss. 211, 21 So. 12 (1897).

[31]Hundly v. Mount, 8 Smedes & M. 387 (Miss. 1847).

[32]Federal Land Bank v. Newsom, 175 Miss. 114, 161 So. 864 (1935).

[33]81 Miss. 650, 656, 657, 33 So. 442, 443 (1902). See also Baker v. Griffin, 50 Miss. 158 (1874); and Deason v. Taylor, 53 Miss. 697, 701 (1876), in which it was stated that ". . . a purchaser . . . is bound by everything stated in the several conveyances constituting his chain of title. . . ." (thus, conversely, not bound by conveyances outside the constituted chain of title).

> "A purchaser or creditor on examining the title would have found it perfect on the record and was not bound to take notice of a trust deed executed by another person."

The court, speaking of the instrument executed and recorded outside the chain of title, said:[34]

> "It hung out in the air like Mahomet's coffin, and did not touch the records anywhere, so far as Mrs. Nelson's name appears in the line of title."

No small amount of difficulty is presented by the question of whether a grantee under a quit-claim deed is protected in like manner against unrecorded instruments and instruments outside the chain of record title. The effect of a quit-claim deed in the chain of title was discussed in *Chapman v. Sims*:[35]

> "Such a doctrine, as that a quit-claim conveyance in the chain of title affects the party who claims under it with notice of infirmities in the title, would be as impolitic as it is unsupported by reason or authority."

Some courts have taken the view that a quit-claim deed conveys only the interest of the grantor at the time he makes it, and that the recorded quit-claim deed cannot exclude the operation of a prior unrecorded deed or an instrument recorded outside the chain of title. In these jurisdictions a grantee under a quit-claim deed may not claim to be a bona fide purchaser since, they say, he has no reason to believe that he has purchased anything more than the terms which his deed indicates.[36] Many of these jurisdictions have changed to the Mississippi view by adoption of statutes.[37]

After-Acquired Title

If the record shows a good title vested in the vendor at a certain date, and nothing done by him after that time to alienate or encumber the title, it would seem that the purchaser might reasonably feel that his vendor's title was clear. The vendor could, however, have conceivably made an attempted conveyance before his acquisition of title. This conveyance, at a time when the vendor had no interest, could not legally transfer any interest at common law.[38] It is equally well settled, however, that equity will not permit the vendor to plead after-acquired title against the initial

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[34] *Id.* at 657, 33 So. at 443.
[35] 53 Miss. 154, 169 (1876).
[36] Cook v. Smith, 107 Tex. 119, 174 S. W. 1094 (1915); American Mort. Co. v. Hutchinson, 19 Ore. 334, 24 Pac. 515 (1890).
[37] See Notes (1926) 44 A. L. R. 1266, 1269, (1927) 59 A. L. R. 632, 643.
[38] 4 THOMPSON, REAL PROPERTY (1924) § 3626.

vendee.[39] The diversity of opinion in American jurisdictions comes as to the rights of purchasers from the vendor after his acquisition of title, and what notice, if any, is charged to one searching the records, of the prior conveyance.[40] Mississippi courts have often invoked the doctrine of estoppel against the vendor. Apparently a case requiring application of the doctrine to a purchaser from the vendor has never arisen in this state. The view that probably bears the greater weight of authority is given in *American Jurisprudence*:[41]

> "A rule apparently more consonant with the recording laws . . . is that a record deed by one who has no title, but who afterwards acquires title, is not constructive notice to a subsequent purchaser or encumbrancer in good faith from the same grantor."

The courts which have formulated this rule go on the basis that the purchaser has done nothing for which he could, like his grantor, be estopped unless he has actual notice of the initial conveyance, or unless it can be said that he is charged with constructive notice of the conveyance by operation of the recording statutes. In the absence of actual notice or circumstances which should put a purchaser upon inquiry, the courts have hesitated to charge the purchaser with constructive notice of deeds from the immediate grantor, prior to his acquisition of title. The position of the Mississippi Supreme Court is yet to be determined. The doctrine of *Mangold v. Barlow*,[42] and the readiness of the court to protect the initial grantee under the recorded instrument, might be some indication that it would favor the original grantee as against the subsequent purchaser. Yet the court in *Hart v. Gardner*[43] limited the operation of the statutes to those instruments which afforded no notice but ". . . hung out in the air like Mahomet's coffin. . . ." One searching the record would hardly question the title of a grantor who, having received a valid legal title, has done nothing since he received it to encumber or convey. Before acquisition of title the grantor was a stranger to the record title. His pre-acquisition conveyance was nothing more or less than the conveyance by one stranger to the chain of record title to another.

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[39]Mississippi Sawmill Co. v. Douglass, 107 Miss. 678, 65 So. 885 (1914); Anderson v. Wilder, 83 Miss. 606, 35 So. 875 (1904); Ethridge, *The After-Acquired Property Doctrine and Its Application in Mississippi* (1945) 17 Miss. L. J. 153; Note (1909) 22 Harv. L. Rev. 136.

[40]5 Tiffany, Real Property (3d ed. 1939) § 1267; Note (1921) 25 A. L. R. 84. Two theories of estoppel by deed prevail in American jurisdictions. The first is sometimes called the "shooting-through" theory, that title "shoots" through the grantor to the first grantee. The other is the "striking-dumb" theory, that the original grantor is judicially prohibited from speaking the fact that title was acquired after the conveyance. Some bearing on the rights of subsequent purchasers may be had by the difference in these two views.

[41]45 Am. Jur. 477.

[42]72 Miss. 78, 16 So. 390 (1894). See *supra* note 23 and accompanying text.

[43]81 Miss. 650, 657, 33 So. 442, 443 (1902).

Priorities

Suppose that *A* conveys Blackacre to *B,* who fails to file his deed for record. At a later date *A,* being still the record title-holder, conveys Blackacre to *C* who has no notice of the deed to *B*. After the conveyance to *C,* but before *C* has recorded his deed, *B* filed his deed for record. Who shall prevail?

The first rule in Mississippi was laid down in *Craig v. Osborn.*[44] Under Section 2292, Hemingway's Code 1917 (Section 2788, Code of 1906), the statute did not give preference in the order of filing, and as to subsequent purchasers for value without notice, it was not material whether the subsequent deed be filed for record or not. The statute declared unrecorded instruments to be "void" as to subsequent purchasers and judgment creditors without notice. The court held, pursuant to the statute, that the recording by *B* of his deed after the conveyance to *C,* but before the recording of *C's* instrument, would not validate *B's* heretofore unrecorded instrument against *C*. Thus, in the assumed case above, the right of *C* was paramount.

Dissatisfaction with the doctrine led the Legislature in 1924 (Chapter 239) to amend the registry acts so as to change the rule in *Craig v. Osborn.*[45] After the amendment the priority of time of filing determined the priority of all conveyances of the same land as between the several holders of such conveyances. Judicial statement of the new rule came with the decision in *Owen v. Potts.*[46] Thus *B,* who is prior in time of filing, is paramount in title.

Of What The Record Is Notice

A common practice in the state is that of giving a mortgage to secure not only notes of even date, but providing also for future advancements from mortgagee to mortgagor, to be secured by the same mortgage. Not a universal doctrine, but perhaps the weight of authority, holds to the rule that a prior recorded mortgage constitutes a prior lien for all advancements made pursuant thereto.[47] More diversity of opinion in American jurisdictions is shown in regard to advancements made after a conveyance by the mortgagor to third persons has been executed and recorded. It has been held in some jurisdictions that the record of a subsequent mortgage or conveyance, or the docketing of a subsequent judgment, constitutes

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[44]134 Miss. 323, 98 So. 598 (1923).
[45]*Ibid.*
[46]149 Miss. 205, 115 So. 336 (1928).
[47]Witczinski v. Everman, 51 Miss. 841 (1876); 4 POMEROY, EQUITY (5th ed. 1941) § 1198.

constructive notice of its existence to the prior mortgagee.[48] In *Witczinski v. Everman,*[49] it was held that where a mortgage expresses on its face the nature and purpose of the security and the extent to which the advances may be made, so that the record of it would put parties upon an inquiry and enable them to use ordinary diligence to ascertain the material facts, its lien will prevail against subsequent purchasers or encumbrancers, for advances made in pursuance of its terms by the mortgagee, *after* he had received notice of such purchase or encumbrance, as well as those made before any notice.

This rule is applied in some jurisdictions only in those instances where provision for advancements is obligatory.[50] Apparently no distinction between obligatory and optional provisions was made in the *Witczinski* case or the more recent Mississippi decisions which uphold it.[51]

The record charges subsequent purchasers and judgment creditors with the contents of recorded instruments and those facts which a diligent inquiry would reveal. The purchaser or creditor is required to seek and determine the facts to which the record might reasonably lead him. The duty thus imposed is expressed in *Plant v. Shryock,*[52] where an unrecorded renewal was made to a mortgage which on its face, was barred by the statute of limitations. The duty of the purchaser was thus expressed:[53]

> "The note appearing on its face to be barred by the statute of limtations, in fact it was not barred, having been kept alive by a new promise in writing as required by law, and it was incumbent on a purchaser. . . to pursue the inquiry suggested by the state of the record and ascertain if, notwithstanding the apparent bar of the note, it was in truth still a valid subsisting debt."

The change-over from the English view of enrollment statutes has taken the courts away from the proposition that recording is for the prevention of fraud, the protection of subsequent purchasers and prevention of secret conveyances. The modern view, and especially the Mississippi view, looks to the protection of those who are parties to the instrument of record. All questions of records and recording statutes in this state must be viewed through the doctrine of *Mangold v. Barlow.*[54] When the vendee

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[48] 4 POMEROY, EQUITY (5th ed. 1941) § 1198.
[49] 51 Miss. 841 (1876).
[50] 4 POMEROY, EQUITY (5th ed. 1941) § 1198.
[51] Liberty Mercantile Co. v. Allen, 134 Miss. 354, 98 So. 774 (1924); Grey v. Helm, 60 Miss. 131 (1882).
[52] 62 Miss. 821 (1885).
[53] *Id.* at 824.
[54] 61 Miss. 593 (1884).

or mortgagee has complied with that which is required of him by statute; when his instrument has been properly executed, acknowledged and lodged with the proper officer for record, let the buyer beware.

William Ward

RECENT DECISIONS

AGENCY—BROKER'S RECOVERY FOR SERVICES RENDERED AFTER THE EXPIRATION OF THE TIME LIMIT SPECIFIED IN HIS CONTRACT.

Plaintiff was employed by defendants to sell a plantation. The testimony was in dispute, but the court assumed that plaintiff had until September 5 to find a purchaser and complete the sale. The testimony was also in dispute as to whether plaintiff performed the terms of his contract shortly before or shortly after the time limit. In a suit to recover his commission, HELD: Where agency contract was ambiguous as to expiration date, the continued efforts of agent to sell land under authority previously conferred under such circumstances as to apprise owners of fact that agent still regarded contract as remaining in force and showing their approval of that construction constituted sufficient consideration to support verbal authority, either express or implied, from owners for agent to continue his services. *Partee v. Pepple,* 20 So. (2d) 73 (Miss. 1944).

The right of a broker to remuneration from his alleged employer is based upon a contractual relationship between the parties.[1] When there is no express contract, the broker who seeks to recover compensation must produce facts which are sufficient to form an implied contract.[2] The courts have not specified whether the implied contract should be implied in fact, or implied in law, but have used the broad term, "implied contract," without further elucidation.[3]

The rule of law announced in the principal case, that a broker may recover for his services even though the time limit on the contract has expired, if the owner by his acquiescence knowingly permits the broker to continue in his efforts to sell, seems to be universally applied under similar facts. There is a conflict of authority as to the ground on which the broker can recover when the sale is completed shortly after the original contract expired, whether it is on the express contract, or whether an implied contract must be found. It has been held that the transaction is a continuing one, and the owner merely waives the time limit.[4] If the broker continues in his efforts to sell and the owner does nothing to stop him, but knowingly permits him to go ahead, the relationship of the broker and his employer is continued.[5] In an Illinois case,[6] the court held that where a broker was given one week in which to sell, but did not complete the sale until the end of two weeks, the original contract was still in force if the owner by his acquiescence permitted the broker to continue his efforts. The court flatly denied that they were upholding any implied contract

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[1]W. Ross Campbell Co. v. Herbert's of Los Angeles, 110 Cal. App. 244, 293 Pac. 805 (1930); Goetz v. Berman, 31 Del. (1 W.W. Harr.) 41, 111 Atl. 235 (1920); Russell v. Johnson, 126 Miss. 896, 89 So. 773 (1921); Leight-Benson Realty & Constr. Corp. v. J. D. Stone & Co., 138 Va. 511, 121 S. E. 883 (1924).

[2]W. Ross Campbell Co. v. Herbert's of Los Angeles, 110 Cal. App. 244, 293 Pac. 805 (1930), cited *supra* note 1; Viley v. Pettit, 96 Ky. 576, 29 S.W. 438 (1895); Crain v. Miles, 154 Mo. App. 338, 345, 134 S.W. 52, 55 (1911).

[3]In Leight-Benson Realty & Constr. Corp. v. J. D. Stone & Co., 138 Va. 511, 121 S.E. 883 (1924), cited *supra* note 1, the court said, "It is impossible to reconcile the expressions of the courts involving the commissions of real estate brokers." 121 S.E. at 884.

[4]Moore v. Borgefeldt, 96 Cal. App. 306, 273 Pac. 1114 (1929) (sale completed two weeks after the time limit); Reynor v. Mackrill, 181 Iowa 210, 164 N.W. 335 (1917).

[5]Gulf Trading Co. v. Radcliff, 216 Ala. 645, 114 So. 308 (1927); Ice v. Maxwell, 61 W.Va. 9, 55 S.E. 899 (1906).

[6]Griswold v. Pierce, 86 Ill. App. 406 (1899).

between the parties, but were recognizing the express contract, the terms of which were not met until shortly after the contract expired. However, it has been held that where a sale is not completed within the time allowed, but is completed shortly thereafter, the broker can recover on a *quantum meruit* count.[7] The court did not discuss what would have been the effect if the broker had sued on his express contract instead of on a common count.

If a broker does not complete the sale shortly after, but several months after the time limit has expired, a different situation might arise. Again, as in the case where the sale was completed shortly afterwards, the courts have generally allowed the broker to recover if the owner has allowed him to continue his efforts, but they have been at greater variance as to the grounds on which such recovery is based. Recovery has been allowed on the express contract, the court refusing to allow recovery based on the reasonable value of the broker's services.[8] The California court allowed a broker to recover even though the sale was not consummated until three months after the time limit expired.[9] Recovery was based on the fact that the owner had waived the time limit, and the court held that there was a continuing obligation under the terms of the old contract. However, it was held that where a sale is made four months after the time limit has expired, any recovery must be based on a contract implied in law, or on a *quantum meruit* count,[10] and that the only use which the express contract might serve would be as a gauge in helping assess the reasonable amount to which the broker is entitled because of his labor.[11]

The important thing to note is the fact that the courts have in general allowed recovery to the broker even though he does not complete his sale within the time specified in his contract, *if* the owner, knowing the broker is continuing his efforts, says nothing but allows the broker to go ahead and then reaps the benefit of the broker's labor. This is true whether the sale is consummated shortly after, or months after, the specified time when the sale should have been completed. In the former case, recovery is usually allowed on the broker's original, express contract, the courts holding that there was a mere waiver of the time limit by the owner, while in the latter case, the courts have been in greater confusion, recovery being allowed in some cases on the express contract and in other cases allowed on an implied contract.

Robert P. Roberts, Jr.

BANKS AND BANKING—JOINT BANK ACCOUNTS—RIGHT OF SURVIVORSHIP.

Deceased shifted his bank account because of "some difficulties," and made the deposit to the credit of his mother, the deposit slip being in her name, but bearing the notation by the cashier, "This A/C subject to check by F. M. Leverette at any time." The signature card simultaneously prepared stated, "Authorized signatures, F. M. Leverette, subject to check by F. M. Leverette at any time." Suit by administratrix against mother of deceased to determine ownership of the account. HELD: The ac-

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[7]Bailey v. Padgett, 195 Ala. 203, 70 So. 637 (1915).

[8]Cole v. Crump, 174 Mo. App. 215, 156 S.W. 769 (1913); see also Stiewel v. Lally, 89 Ark. 195, 115 S.W. 1134 (1909).

[9]Estes v. Hotchkiss, 63 Cal. App. 284, 218 Pac. 605 (1923).

[10]Umphray v. Hufschmidt, 73 Cal. App. 140, 238 Pac. 749 (1925).

[11]*Accord,* Ackles v. Beatty, 52 N.S.R. 134 (1918); Hug v. Theilacker, 192 Wis. 330, 212 N.W. 671 (1927) (sale completed eight months after time limit; court held that no recovery could possibly be based on the express contract); Stewart v. Roberts, 33 Ky. Law Rep. 332, 110 S.W. 340 (1908) (sale completed two months after time limit).

count was the property of the decedent's estate. *Leverette v. Ainsworth*, 23 So. (2d) 798 (Miss. 1945).

At common law, survivorship was an incident of joint tenancy in realty,[1] and such an estate embraced the unities of interest, title, time and possession.[2] The joint tenants were regarded as holding *per my et per tout*.[3] Joint tenancy in personalty was also permitted at common law,[4] when the technical requirements were met. Later joint tenancies fell into disfavor in the eyes of the law, and statutes[5] reflected this attitude. The desirability of the right of survivorship has caused renewed use of the features of joint tenancy in cases of bank deposits, and the use of such device has eliminated the necessity of administration of small estates composed principally of bank accounts.[6] Today an inspection of the digests reveals that a majority of the cases on joint tenancy involve bank deposits, and not realty. The presumption against joint tenancies in land has had little effect upon the power to create joint tenancies in bank accounts.[7]

That a joint bank account may be created in the name of two or more persons, with the incident of survivorship, is generally recognized.[8] The courts have experienced some difficulty, however, in reaching this conclusion,[9] and have adopted various theories to reach the desired result, among them being gift,[10] trust,[11] contract,[12]

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[1] 2 Bl. Comm. *184.

[2] *Id.* at *180.

[3] *Id.* at *182.

[4] *Id.* at *399.

[5] Miss. Code Ann. (1942) § 834, a typical statute, provides: "All conveyances or devises of land made to two or more persons, or to a husband and wife, shall be construed to create estates in common, and not in joint-tenancy or entirety, unless it manifestly appears from the tenor of the instrument, that it was intended to create an estate in joint-tenancy or entirety with the right of survivorship; . . ." See Conn v. Boutwell, 101 Miss. 353, 58 So. 105 (1911) (conveyance to "X and wife" held to create tenancy in common).

[6] This device is referred to by writers as a "poor man's will"; see Havighurst, *Gifts of Bank Deposits* (1936) 14 N. C. L. Rev. 129; Note (1924) 38 Harv. L. Rev. 243; (1930) 44 Harv. L. Rev. 301.

[7] Note (1933) 85 A.L.R. 282; *see* (1928) 77 U. of Pa. L. Rev. 290.

[8] Kelly v. Beers, 194 N. Y. 49, 86 N. E. 980 (1909); 5 Michie, Banks & Banking (Perm. ed. 1932) § 46; 5 Zollman, Banks & Banking (Perm. ed. 1936) § 3221; 7 Am. Jur. 299; 9 C.J.S. 595; 3 R.C.L. 527; Notes (1908) 12 L.R.A. (N.S.) 355; Ann. Cas. 1916D, 520; L.R.A. 1917C, 550; (1927) 48 A.L.R. 189; (1930) 66 A.L.R. 881; (1936) 103 A.L.R. 1123; (1941) 135 A.L.R. 993; (1944) 149 A.L.R. 879.

[9] *See* Hemingway, *Joint Tenancy in Bank Accounts* (1931) 10 Chi-Kent L. Rev. 37, at 45, and, generally, Note (1937) 32 Ill. L. Rev. 57.

[10] *In re* Johnson's Estate, 116 Neb. 686, 218 N.W. 739 (1928); Kelly v. Beers, 194 N.Y. 49, 86 N.E. 980 (1909); Green v. Comer, 193 Okla. 133, 141 P.(2d) 258 (1943); Beach v. Holland, 172 Ore. 396, 142 P.(2d) 990, 149 A.L.R. 866, 879 (1943); *see*, generally, Havighurst, *Gifts of Bank Deposits* (1936) 14 N. C. L. Rev. 129. *But see* Note (1924) 38 Harv. L. Rev. 243.

[11] Booth v. Oakland Sav. Bank, 122 Cal. 19, 54 Pac. 370 (1898); Murphy v. Haynes, 197 Ky. 444, 247 S.W. 362 (1923); Kornmann v. Safe Deposit & Trust Co., 180 Md. 270, 23 A.(2d) 692 (1942); *cf.* Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922).

[12] *In re* Winkler's Estate, 232 Iowa 930, 5 N.W.(2d) 153 (1942) (contract of joint tenancy); Armstrong v. Morris Plan Industrial Bank, 282 Ky. 192, 138 S.W.(2d) 359 (1940); Sage v. Flueck, 132 Ohio St. 377, 7 N.E.(2d) 802 (1937); Deal's Adm'r v. Merchants & Mechanics' Sav. Bank, 120 Va. 297, 91 S.E. 135, L.R.A. 1917C, 548, 550 (1917); a convenient formula is suggested in (1932) 17 St. Louis L. Rev. 366, at 367: "*A* gives a sum of money to *X*, the bank, which thereby becomes the debtor. The debtor is told to pay the money to either *A* or *B*. *A* and *B* thereby become joint tenants, or joint owners, of the chose in action."

joint tenancy,[13] and tenancy by the entireties.[14] Of these, contract and joint tenancy are of recent development.[15] While there are few direct holdings that a joint tenancy is created unaided by statute,[16] the courts seem to favor the use of the device.[17] Statutes[18] in many jurisdictions, authorizing banks to pay the balance of joint accounts to the survivor, have had the effect of fixing the ownership in the survivor,[19] of creating a presumption of ownership,[20] or merely of affording a protection to the bank.[21] The Mississippi statute[22] has been variously construed.[23]

The Mississippi court has undergone the typical difficulty in giving effect to the intention of the parties. In *Godwin v. Godwin*,[24] the depositor sought the advice of the banker in order to give his wife the right of survivorship. Following the instructions of the banker, he had the account made in the name of himself "or wife." Upon his death the money was paid by the bank to the widow, but his administrator recovered from the widow. The intention of the depositor was clear, but the court refused to allow survivorship in the widow, as the requisite elements of a gift either *inter vivos* or *causa mortis* were lacking.[25] The statute availed the widow nothing.[26] There was no mention of a joint tenancy in the account, indicating the desire of the court to adhere to the gift theory of joint accounts.

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[13]Erwin v. Felter, 283 Ill. 36, 119 N.E. 926 (1918); 28 YALE L. J. 96; New Jersey Title Guar. & Tr. Co. v. Archibald, 91 N.J. Eq. 82, 108 Atl. 434 (1919); *In re* Iver's Estate, 4 Wash.(2d) 477, 104 P.(2d) 467 (1940).

[14]Black v. Black, 199 Ark. 609, 135 S.W.(2d) 837 (1940); Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060 (1901); Geist v. Robinson, 332 Pa. 44, 1 A.(2d) 153 (1938).

[15]Notes L.R.A. 1916C, 550, at 551; (1927) 48 A.L.R. 189 at 203 and (1930) 66 A.L.R. 881 at 891 point out that the creation of a gift or trust is a condition precedent to the existence of a joint tenancy; but in Note (1936) 103 A.L.R. 1123, the annotator recognizes the existence of the trend in favor of joint bank accounts arising out of contract or joint tenancy, unsupported by the gift or trust theories.

[16]*See* Havighurst, *Gifts of Bank Deposits* (1936) 14 N. C. L. REV. 129, at 155, n. 129 for list of states in which joint tenancies are expressly created by statute.

[17]*See* note 43, *infra*.

[18]A comprehensive listing of statutes is to be found in 1 BOGART, TRUSTS & TRUSTEES (1935) 222, n. 99.

[19]CALIF. GEN. LAWS (Deering, 1938) Act 652, § 15 a; NEB. COMP. STAT. (1929) § 8-164; N. Y. BANKING LAW § 239 (3); VT. PUB. LAWS (1933) § 6722.

[20]MICH. STAT. ANN. (Supp. 1942) § 23.303.

[21]ARK. DIG. STAT. (Pope, 1937) § 727(a); IOWA CODE (1939) § 9267; OHIO GEN. CODE (1930) § 710-120; WASH. REV. STAT. (Remington, 1932) § 3249.

[22]MISS. CODE ANN. (1942) § 5205, provides: "When a deposit has been made or shall hereafter be made in the name of two persons, payable to either, or payable to either or the survivor, such deposit or any part thereof or interest or dividends thereon, may be paid to either of the said persons whether the other be living or not, . . ."

[23]Godwin v. Godwin, 141 Miss. 633, 107 So. 13 (1926) (for protction of bank); *In re* Lewis' Estate, 194 Miss. 480, 13 So. (2d) 20 (1943) (possible presumption of joint ownership); Leverette v. Ainsworth, 23 So. (2d) 798 (Miss. 1945) (presumption of joint ownership).

[24]141 Miss. 633, 107 So. 13 (1926), *overruled by In re* Lewis' Estate, 194 Miss. 480, 13 So. (2d) 20 (1943).

[25]"However clear the intention of Mr. Godwin that his wife should have this fund, it has been . . . repeatedly held by this court that there must be a delivery of the property intended to be donated. . . ." *Id.* at 639, 107 So. at 14.

[26]"Its [the statute's] main purpose was to provide for the release and discharge of the bank by the payment of a fund to the survivor of joint deposits of funds in bank, and makes no effort to amend, alter or change in any manner the laws of descent and distribution. . . ." *Ibid.*

There were sufficient differences in fact in *Stephens v. Stephens*[27] to allow distinction from the *Godwin* case,[28] in that a printed form[29] was signed by the depositors, and the court sustained the claim of the surviving widow to the account. The court, however, indicating a possible change of attitude, expressed doubt as to the necessity of following the gift theory.[30]

The case of In re *Lewis' Estate*[31] created the opportunity for the court to select the theory it would follow. The incomplete evidence indicated that the depositor intended to create a joint bank account with the right of survivorship. The court sustained the claim of the survivor. The decision would have been impossible in the face of the holding in the *Godwin* case,[32] and in order to clarify the basis for the ruling, the *Godwin* case was overruled on the facts therein.[33] The court declined, however, to adopt a single theory as basic for creation of a joint account with right of survivorship. The gift theory was again questioned,[34] and was held to be insufficient in itself as a basis for decision.[35] The court did give added interpretation to the statute,[36] suggesting that it gave rise to a *prima facie* presumption of joint owner-

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[27]193 Miss. 98, 8 So. (2d) 462 (1942).

[28]141 Miss. 633, 107 So. 13 (1926).

[29]The form used is as follows: "Joint Account—Payable to Either or Survivor. We agree and declare that all funds now, or hereafter, deposited in this account are, and shall be, our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common; and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by, or upon the order of, either of us or the survivor. It is especially agreed that withdrawals of funds by the survivor shall be binding upon us and upon our heirs, next of kin, legatees, assigns and personal representatives." Provision is made for signature. 193 Miss. at 101, 8 So.(2d) at 463. This form is promulgated by the Mississippi State Banking Department. *In re* Lewis' Estate, 194 Miss. 480, 490, 13 So. (2d) 20, 22 (1943).

[30]". . . And *if* gift be an element in the situation, there was an effectual consummation of the gift by way of the delivery of the written instrument to the bank as the performance agent of the donee, as well as of the donor. . . ." (Italics added). Stephens v. Stephens, 193 Miss. 98 at 102, 8 So.(2d) 462 at 463. The annotator in 149 A.L.R. at 880 classifies the *Stephens* case as following the gift theory.

[31]194 Miss. 480, 13 So.(2d) 20 (1943).

[32]141 Miss. 633, 107 So. 13 (1926).

[33]The brief of the appellant (surviving wife), as reported in 194 Miss. at 482, relied on the *Stephens* case solely, while the appellee (administrator) based his case on the *Godwin* case. The court overruled the *Godwin* case, using the following language: ". . . [T]he *Godwin* case was incorrectly decided on the actual facts involved; that such decision should be and is hereby overruled insofar as it may be deemed an authority for holding that the survivor is not entitled to the funds where the deposit was made under such circumstances as those involved in that case and the case at bar. . . ." 194 Miss. at 495, 13 So.(2d) at 26.

[34]". . .[I]f indeed the gift element enters into the equation at all where such a deposit is made under a contract evidencing a clear intention to create a joint interest and ownership in the fund, with the right of either party to check on the same, and where the right of survivorship follows as a necessary incident thereto. . . ." *Id.* at 490 13 So.(2d) at 23. *Quaere,* Does this language indicate possible adherence to the contract theory?

[35]"It is obvious that for a depositor to surrender the exclusive control and possession of a deposit . . . would be wholly inconsistent with the theory of a joint tenancy therein. . . . We therefore conclude that the rights of the parties . . . cannot be determined merely by the fact of whether or not the essential requisites of a valid gift of tangible personal property must appear. . . ." *Id.* at 495, 13 So.(2d) at 26.

[36]Miss. Code Ann. (1942) § 5205, quoted note 19 *supra.*

ship with right of survivorship.[37] The Chief Justice, in his dissent, relied on the gift theory completely.[38]

Upon the facts found by the chancellor in the principal case,[39] it is clear that there was not created a joint account with the right of survivorship, but that a mere change of form was effected as a matter of convenience to the depositor. The court still appears to be constrained to discuss the gift aspect.[40] Language is used giving greater force to the presumption created by the statute.[41] The court is apparently proceeding cautiously, in an effort not to divorce itself from any device which may prove helpful in the decision of a later case. The effect is that while the result reached in Mississippi is clear, the precise basis is yet to be defined.

If a court is to abide by the strict common law requirements of a joint tenancy, technical difficulties will prevent giving effect to the intention of the parties in some cases.[42] If a liberal attitude is adopted, allowing depositors to create a condition in the *nature* of a joint tenancy, whether a strict joint tenancy or not, the desired result can more easily be attained.[43] This liberal attitude, coupled with the statutory presumption and use of the proper form, or clear evidence of intent in the absence of such form, will assure depositors of the accomplishment of their wishes.[44]

T. Owen Roberts

CORPORATIONS—STOCKHOLDER'S PRIVILEGE TO INSPECT CORPORATE RECORDS—EFFECT OF STATUTE REQUIRING INSPECTION BY INSURANCE COMMISSIONER.

Mandamus to compel executive officers of domestic insurance corporation to permit plaintiff, a stockholder thereof, to inspect corporate records at seasonable

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[37]". . .It is true . . . that any presumption arising therefrom [from the statute] as to the joint ownership of the fund with the right of survivorship may be overthrown by proof of a contrary intention. . . ." *In re* Lewis' Estate, 194 Miss. at 493, 13 So.(2d) at 25.

[38]*Id.* at 496, 13 So. (2d) at 26; *see* Smith v. Taylor, 183 Miss. 542, 184 So. 423 (1938) for possible source of gift attitude.

[39]Leverette v. Ainsworth, 23 So.(2d) 798 (Miss. 1945).

[40]"It is equally well settled that a person may make a *gift in joint tenure* by making a deposit of the subject of the gift in a bank in such a manner that it shall stand to the credit, as joint owners, of the donor and the donee. . . ." (Italics added). *Id.* at 799. Is any consideration of a gift necessary?

[41]". . . Where . . . John Doe makes a deposit to the credit of 'John Doe or Richard Roe' which under the statute . . . would raise the presumption that the deposit was intended to be in joint ownership. . . . Precise form is not essential . . . when the facts . . . are sufficient to disclose . . . clear intention to create a right which embraces the essential elements of joint ownership and survivorship. . . ." *Ibid.* Apparently no words of survivorship are necessary in Mississippi, and the statute raises the presumption in any case where the account is denominated "*X* or *Y*" or "*X* and *Y*."

[42]*Cf.* Heard v. Gurdy, 127 Me. 480, 144 Atl. 399 (1929) (absence of common law unities of joint tenancy precluded creation of joint tenancy in account).

[43]*Cf.* Wisner v. Wisner, 82 W. Va. 9, 95 S.E. 802 (1918) (survivorship allowed regardless of theory); Hollingsworth v. Hollingsworth, 212 Iowa 1165, 235 N.W. 726 (1931) (the intent governs, regardless of what it is called); *see* (1926) 36 YALE L. J. 138.

[44]Chief Justice Smith, in his dissenting opinion from *In re* Lewis' Estate, 194 Miss. at 497, 13 So.(2d) at 26, said: ". . . [I]f two persons wish to carry an account in a bank in both of their names, subject to the check of either, with the right of survivorship, all they will have to do is to sign one of the bank joint account cards . . . approved in *Stephens v. Stephens* [193 Miss. 98, 8 So.(2d) 462 (1942)], a very simple and easy thing to do." *See* note 29 *supra.*

time to ascertain if corporate affairs were being conducted properly. Trial court sustained a demurrer. On appeal, reversed and remanded. HELD: (1) At common law, a stockholder is privileged to inspect corporate records for proper purposes and at seasonable time; the burden of alleging and establishing improper motives rests on the party denying the privilege. (2) A stockholder in an insurance corporation is not deprived of that privilege by legislation regulating insurance companies,[1] which provided, *inter alia,* that the commissioner of insurance shall examine the affairs of a domestic insurance corporation upon the request of five or more stockholders, policy-holders, creditors or other persons pecuniarily interested therein. Two justices dissented on the ground that insurance legislation had narrowed the common law privilege. *Sanders v. Neely,* 19 So. (2d) 424 (Miss. 1944).

In the absence of statute, courts in the United States uniformly have held that stockholders have the right to inspect the corporate books. The purpose of the inspection must be proper[2] and not of a malicious, hostile, or unlawful nature.[3] The privilege to inspect is based on the theory that those in charge of the corporation are the agents of the stockholders, the real owners.[4]

The inspection of corporate records now is regulated in many states by statute.[5] These statutes generally are construed not to abrogate the common law right, but rather to simplify it and remove restrictions relating to proceedings thereunder.[6] Further, where a statute is ambiguous, it is construed with reference to common law principles in force at the time of its passage.[7]

The result attained by the majority of the court in the instant case appears proper. This accords with the rule that statutes in derogation of the common law

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[1]MISS. CODE ANN. (1942) §§5628, 5715.

[2]Guthrie v. Harkness, 199 U.S. 148, 26 Sup. Ct. 4, 50 L. ed. 130 (1905); State *ex rel.* Cochran v. Penn-Beaver Oil Co., 34 Del. (4 W.W.Harr.) 81, 143 Atl. 257 (1926) (Court says that the common law right of inspection cannot be taken away except by statute that expressly or by necessary implication authorizes it); Woodworth v. Old Second Nat. Bank, 154 Mich. 459, 117 N.W. 893 (1908); State v. Sagl, 119 Neb. 374, 229 N.W. 118 (1930).

[3]Schmidt v. Anderson, 29 N.D. 262, 150 N.W. 871 (1915); American Mortgage Co. v. Rosenbaum, 114 Ohio St. 231, 151 N.E. 122 (1926); Moore v. Rock Creek Oil Corp., 59 S.W.(2d) 815 (Tex. Civ. App. 1933). In the last cited case, the Texas court said: ". . . when the corporation pleads, and is able to establish by proof, a state of facts sufficient to convince the court that the stockholder is not seeking the information which might be revealed by the desired inspecion for the protection of his interest as a stockholder, or that of the corporation, but that he is actuated by corrupt or unlawful motives, the court will not, by the issuance of its writ of mandamus, aid him to consummate such corrupt and unlawful purposes." 59 S.W.(2d) at 818. Texas has been held to be a state where the right of inspection is absolute.

[4]Guthrie v. Harkness, 199 U.S. 148, 26 Sup. Ct. 4, 50 L. ed. 130 (1905), cited *supra* note 2; Varney v. Baker, 194 Mass. 239, 80 N.E. 524 (1907); *In re* Steinway, 159 N.Y. 250, 53 N.E. 1103 (1899). In the *Steinway* case, the court said: "Stockholders as owners of the corporation, for a proper purpose, are entitled to reliable information as to its condition and affairs and the manner of conducting its business. . . " 53 N.E. at 1106.

[5]STEVENS, PRIVATE CORPORATIONS (Hornbook Series 1936) §108; 5 FLETCHER, CYCLOPEDIA OF CORPORATIONS (perm. ed. 1931) §2215.

[6] 5 FLETCHER, CORPORATIONS (perm. ed. 1931) 579, §2215: "While the courts of several states have construed the statutes thereof as merely declaratory of the common-law right, the majority of these provisions, notwithstanding they differ materially in language and scope, have been construed in substantial harmony as to their general purpose, that is, to enlarge and extend the common-law right."

[7]Powell v. Amarillo, 127 Tex. 294, 93 S.W.(2d) 144 (1933); Brammall v. LaRose, 105 Vt. 345, 165 Atl. 916 (1933).

shall be strictly construed.[8] The Mississippi statute regulating insurance companies does not expressly abrogate the stockholder's common law privilege. One section dealing with inspection provides that it shall be made by the commissioner of insurance ". . . as to its financial ability and condition as often as once in two years, . ." and ". . . whenever he deems it prudent to do so, or upon the request of five or more of the stockholders, policyholders, creditors, or other persons pecuniarily interested therein, . . . "[9] The other section on the subject requires an investigation by the same official for alleged violations of the provisions of the insurance statute when complaint is made by a citizen who has posted a certain bond.[10] These sections were designed primarily for protection of the policyholder. They do not provide a practical remedy to a stockholder who believes that the corporation is committing wrongful acts which are endangering his investment. The stockholder in many instances would suffer irreparable injury before the commissioner would have an opportunity to make the inspection. Further, as a matter of policy, it seems undesirable to burden the commissioner with making an inspection in the numerous cases where a stockholder's interests would be as effectively protected by permitting him, his attorney, or his accountant, to inspect the records.

The effect of the dissenting opinion would be to limit stockholders of insurance corporations to a much narrower privilege than that possessed by stockholders of other corporations.

J. W. Bunkley, Jr.

ESTATES—CONVEYANCE TO GRANTEE "AND THE CHILDREN OF HER BODY"—EFFECT WHEN GRANTEE HAD NO CHILDREN *In Esse* AT TIME OF CONVEYANCE.

A husband and wife, for and in consideration of natural love and affection, conveyed certain realty to their unmarried daughter "and the children of her body," reserving to the wife a life estate. Subsequently the daughter married and had children who filed a bill for construction of the deed. HELD: The deed conveyed a fee simple estate to the daughter. *Ewing v. Ewing,* 22 So. (2d) 225 (Miss. 1945).*

Deeds and wills passing interest in realty to one and his children, there being no children *in esse* at the effective date of the instrument, are susceptible of two constructions. One line of authorities interprets the word "children" to be a word of purchase,[1] adopting the life tenant-remainderman construction. Another line of authorities interprets the word "children" to be a word of limitation.[2] At common law

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[8]Potter v. Fidelity & Deposit Co. of Md., 101 Miss. 823, 58 So. 713 (1912); Holman v. Bennett, 44 Miss. 322 (1870).

[9]MISS. CODE ANN. (1942) §5628, cited *supra* note 1.

[10]*Id.*, §5715, cited *supra* note 1.

*Editor's note: Since the completion of this comment, *Ewing v. Ewing* has been reported in 161 A.L.R. at page 606, together with an extensive note beginning on page 612.

[1]Fales v. Currier, 55 N. H. 392 (1875). There are but two ways of acquiring real estate: one by descent, and the other by purchase. If one does not take as heir, he takes by purchase, no matter how he acquires the title.

[2]Dilliard v. Yarbora, 77 S. C. 230, 57 S. E. 841 (1907) (Thus construed the word "children" means "heirs of the body" and the parties take, if at all, by inheritance); *accord,* East v. Garrett, 84 Va. 523, 9 S. E. 1112 (1888); Moore v. Gary, 149 Ind. 51, 48 N. E. 630 (1887). *See* Cannon v. Barry, 59 Miss. 289, 300 (1881).

an estate tail would be created;[3] where such estates are abolished, an estate in fee simple is created.[4]

The authorities adopting the fee simple construction base their conclusion on the reasons set forth in the first resolution of *Wild's Case*,[5] which announces the rule:

> ". . . [I]f *A* devises his lands to *B* and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; therefore such words shall be taken as words of limitation. . . ."[6]

This first resolution is widely followed in the United States; it is not a rule of law but a rule of construction.[7] The presumption that the word "children" is a word of purchase gives way to the counter-presumption that it was used as a word of limitation if there are no children in existence at the effective date of the instrument.[8] The word, in its common acceptance, means immediate descendants who are to take as a class in their own right immediately upon the death of the parent. However, if there are no children *in esse* at the effective date of the instrument, such word signifies the descendants infinitum of the parent's body.[9]

The conclusion in the principal case is supported by statute[10] providing that unless express words or the context of the instrument indicates that a lesser estate was intended to be passed, the estate should be adjudged to be one in fee simple.[11] If the fee

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[3]Ewing v. Ewing, 22 So. (2d) 225 (Miss. 1945). *See* Hertz v. Abrahams, 110 Ga. 707, 36 S. E. 409, 410-12 (1900), a discussion of Statute de Donis Conditionalibus, 1285, 13 Edw. I, c. 1, which prohibited the alienation of the fee simple conditional estate—the origin of the estate in fee tail; Simpson v. Antley, 137 S. C. 380, 135 S. E. 469 (1926) (creating a fee simple conditional but reaching the same result); Dilliard v. Yarbora, 77 S. C. 230, 57 S. E. 842 (1907).

[4]Miss. Code Ann. (1942) § 838: "Estates in fee tail are prohibited; and every estate which but for this statute would be an estate in fee tail, shall be an estate in fee-simple."

[5]6 Co. 16b, 77 Eng. Rep. R. 277 (K. B. 1599).

[6]*Id.* at 17a, 77 Eng. Rep. R. at 278.

[7]Larew v. Larew, 146 Va. 134, 135 S. E. 819 (1926) (adopting rule of construction); *accord,* Carr v. Estill, 16b Mon. 309, 63 Am. Dec. 548 (Ky. 1855); *cf.* Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129 (1905). *Contra*: Turner v. Ivie, 52 Tenn. (5 Heisk.) 222, 224 (1871) (rejecting the rule of construction).

[8]Simpson v. Antley, 137 S. C. 380, 135 S. E. 469 (1926); *accord,* Sillman v. Whitaker, 119 N. C. 89, 25 S. E. 742 (1896) (Had a "life estate" been given with remainder to children a different case would be presented). *See* Wild's Case, 6 Co. 16b, 77 Eng. Rep. R. 277, 278 (K. B. 1599) (Intent and words must be considered together; where there are no children no such intent appears); Cannon v. Barry, 59 Miss. 289, 300 (1881); Chrystie v. Phyfe, 19 N. Y. 344, 354 (1859).

In *Ewing v. Ewing* the fact that the daughter was only sixteen years of age strengthened the counter-presumption; it was only "problematical" that she would ever have children; *accord,* Sillman v. Whitaker, 119 N. C. 89, 25 S. E. 742 (1896). *Contra*: Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129 (1905) (it would be a rare occasion when testator could foresee that there would be no children).

[9]Butler v. Ralston, 69 Ga. 485 (1882); *see* Hertz v. Abrahams, 110 Ga. 707, 36 S. E. 409, 411 (1900).

[10]Miss. Code Ann. (1942) § 838.

[11]*Cf.* Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129 (1905) (An identical statute was held to have no application to a deed which contained "words indicating how the title is to pass").

simple construction be followed application of the statute should produce no different result. The rule of construction is rigid in its application, the counter-presumption yielding only to express words or necessary implications from the context of the instrument.[12]

The chief proponents of the life tenant-remainderman construction are the courts of Pennsylvania and Kentucky. These authorities justify their conclusion upon the grounds that estates in tail having been abolished, any rule applicable to them should fail also. Moreover, the statutory conversion of such estates into fee simple estates removes the reason for the rule as the intention of the testator that the children should take can be effectuated in some other manner.[13] Although the words literally and abstractly import an immediate gift not only to the parent but to the children as well, it does not necessarily follow that the testator did not intend that the children should take *in futuro*. As there is a certain intent that the children should take, acknowledged by *Wild's Case,* the only rational and consistent construction is that which will permit the children to take as remaindermen.[14] In England, where estates in tail existed, the intention that the children should take could be effectuated by adhering to *Wild's Case*. The gift to the parent was a gift to his lineal descendants as well—the latter taking by inheritance upon the death of the parent. Where such estates are abolished, that construction would defeat the intention of the testator, for the children would take nothing.[15]

At common law the word "heirs" was necessary in a conveyance *inter vivos* to create an estate of inheritance. To be given any effect when used in a conveyance *inter vivos* the word "children" was interpreted to be a word of purchase.[16] Therefore it must be given the presumptive effect of a word of purchase,[17] yielding only to express words or necessary implications from the context of the instrument.[18] The word "children" is never a word of limitation unless the grantor or testator has unmistakably used it to describe the estate given and not to designate the donees.[19]

It has been suggested that a gift to one and her children preceded by a life estate should be distinguished from a direct gift to one and her children. The gift is not immediate for children might be born before the termination of the preceding life estate.[20] If *Wild's Case* spoke of vesting of possession instead of vesting of interest, this position would be tenable. The first resolution applies because there are no children *in esse,* not because there are no children to take possession. The cases where this question might have arisen have been decided without a discussion of this prob-

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[12]Ewing v. Ewing, 22 So. (2d) 225 (Miss. 1945); Larew v. Larew, 146 Va. 134, 135 S. E. 819 (1926); Simpson v. Antley, 137 S. C. 380, 135 S. E. 469 (1926) (There is no express life estate given); Sillman v. Whitaker, 119 N. C. 89, 25 S. E. 742 (1896) (There is nothing on the face of the will to take it out of the long settle rule).

[13]Carr v. Estill, 16b Mon. 309, 63 Am. Dec. 548 (Ky. 1855).

[14]*Ibid.;* Lacey v. Lacey, 170 Ky. 166, 185 S. W. 495 (1916).

[15]*Ibid.; cf.* Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129 (1905).

[16]Brumley v. Brumley, 28 Ky. Law Rep. 231, 89 S. W. 182 (1905); Baskett v. Sillans, 93 Ky. 3, 19 S. W. 9 (1892).

[17]Martin v. Martin, 52 W. Va. 387, 44 S. E. 198 (1903).

[18]Mefford v. Daugherty, 89 Ky. 58, 11 S .W. 716 (1889) (Qualifying words "bodily heirs" do not restrict the meaning of the word "children"); Lacey v. Lacey, 170 Ky. 166, 185 S. W. 485 (1916); *cf.* Wills v. Foltz, 61 W. Va. 262, 56 S. E. 473 (1907).

[19]Fales v. Currier, 55 N. H. 392 (1875) (a deed).

[20]See Vanzant v. Morris, 25 Ala. 285, 394 (1854).

lem.[21] The effect of the precedent life estate has not been disregarded by the fee simple constructionists. If testator can create a life estate with those exact words in one instance, it is only reasonable to think that he would have used exact words in another instance had he wished to create another life estate.[22]

However, a devise in trust to the parent and her children has a different effect. There is no reason to work out the intention of the testator through an estate tail.[23] The gift is not immediate, the legal estate being given to the trustee and the equitable estate to the parent.[24]

All of the cases are in accord that intent, ascertained by the type of estate and from the language of the instrument, is the controlling factor in construing a conveyance or devise to one and his children.[25] The fee simple constructionists have added the doctrine of public policy, not to ascertain intent, but to support their conclusion. The life tenant-remainder estates are not favored by our property laws.[26] This is especially true where the number interested in the remainder cannot be ascertained until the death of the parent. Until possibility of issue extinct the transferability of the remainder interest is greatly impaired.[27]

On the other hand the authorities adopting the life tenant-remainderman construction have refused to take this proposition into consideration. The gift to the children is a gift to a class who cannot be ascertained until the death of the parent or until possibility of issue extinct.[28]

The present question has arisen almost exclusively in the construction of wills. The construction of wills at common law was not as rigid as in cases involving deeds.[29] However, in the absence of something to change the meaning of technical words, wherever used, these words should be held to express the intent of one who

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[21]Ewing v. Ewing, 22 So. (2d) 225 (Miss. 1945); Larew v. Larew, 146 Va. 134, 135 S. E. 819 (1926): Simpson v. Antley, 137 S. C. 380, 135 S. E. 469 (1926); Cole v. Thornton, 180 N. C. 90, 104 S. E. 74 (1920); Zeigler v. Love, 185 N. C. 40, 115 S. E. 887 (1903); Moore v. Gary, 149 Ind. 51, 48 N. E. 630 (1887); Butler v. Ralston, 69 Ga. 485 (1882).

[22]Ewing v. Ewing, 22 So. (2d) 225 (Miss. 1945); Larew v. Larew, 146 Va. 134, 135 S. E. 819 (1926).

[23]Turner v. Ivie, 52 Tenn. (5 Heisk.) 222 (1871).

[24]*Ibid.*; Cannon v. Barry, 59 Miss. 289, 302 (1881); Buntin v. Plumer, 164 Tenn. 87, 46 S. W. (2d) 60 (1932). *Contra*: Sillman v. Whitaker, 119 N. C. 89, 25 S. E. 742 (1896) (The rule was not applied although the facts would justify it).

[25]Larew v. Larew, 146 Va. 134, 135 S. E. 819 (1926); East v. Garrett, 84 Va. 523, 9 S. E. 1112 (1888) (cases which lay down this proposition and announce the *Wild's Case* rule); Carr v. Estill, 16b Mon. 309, 63 Am. Dec. 548 (Ky. 1855); *cf.* Hall v. Wright, 27 Ky. Law Rep. 1185, 87 S. W. 1129 (1905) (cases which lay down the proposition but reject the *Wild's Case* rule).

[26]Ewing v. Ewing, 22 So. (2d) 225 (Miss. 1945); Sumpter v. Carter, 115 Ga. 893, 42 S. E. 324 (1902). This statement seems opposed to § 835 of the Code of 1942, which abolishes the Rule in Shelley's Case. However, read in connection with § 833, it would seem to mean that the court will be more readily disposed to construe an instrument as passing a fee simple estate and will always do so where such result would be logical if the instrument be susceptible of two constructions.

[27]*Ibid.*

[28]In re Keown's Estate, 238 Pa. 343, 86 Atl. 270 (1913).

[29]Larew v. Larew, 146 Va. 134, 135 S. E. 819 (1926), citing GRAVES, NOTES ON REAL PROPERTY (1913) § 201 (Correct and technical words in wills have never been considered necessary). *Accord,* Fales v. Currier, 55 N. H. 392 (1875); Martin v. Martin, 52 W. Va. 387, 44 S. E. 198 (1903) (both life tenant-remainder construction); East v. Garrett, 84 Va. 523, 9 S. E. 1112 (1888) (fee simple construction).

transfers interest in realty. It is a rare thing to find the courts construing the word "heirs" to mean the word "children."[30] The first resolution of *Wild's Case* will not serve the same purpose in Mississippi as it would in England where estates in tail existed.[31] To a certain extent,[32] the children were assured a gift. By following the same construction in Mississippi, the children are not assured a gift to any extent, for under such construction they cannot take anything.

Louis V. Smith.

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[30]In Right v. Forrester, 1 Bush 278 (Ky. 1867), construing a devise to testator's unmarried daughter "and her bodily heirs," it was held that the phrase was used to mean the word "children."

[31]In England, by Law of Property Act, 1925, 15 GEO. V, estates in tail have been abolished.

[32]Taltarum's Case, Y. B. 12 EDW. IV, f. 19, pl. 25 (1472) (A common recovery suffered by a tenant in tail accomplished the complete destruction of the estate in tail).

In 10 R. C. L. 659, it is said: ". . . [C]ommon recoveries first, and then fines, were brought to bear upon that statute [de Donis] . . . and . . . have so weakened its force and narrowed its range as almost to bring back the subject to the ground it occupied under conditional fees at common law. . . ."

Still the estate in tail cannot be devised away by will; an estate in fee simple can. Should the parent keep the fee simple estate until his or her death, the children could not take the whole estate upon the death of the last spouse if that spouse be not the grantee. Under an estate in tail, the lineal descendants would take all .